Supreme Court, U.S.
FILED

93 1378 JAN 18 1994

OFFICE OF THE CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

WAYNE R. NAPLIN,

Petitioner

--vs--

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MAXEY LAW OFFICES, P.S.

*DENNIS CRONIN
BEVAN J. MAXEY

West 1835 Broadway
Spokane, Washington 99201
(509) 326-0338

ATTORNEYS FOR PETITIONER.
*Counsel of Record

135 pp

QUESTIONS PRESENTED FOR REVIEW

I. THE NINTH CIRCUIT SUPPORTS THE CONTENTION THAT A FAIR PROBABILITY EXISTS THAT CONTRABAND OR EVIDENCE OF A CRIME WILL BE FOUND AT A DEFENDANT'S RESIDENCE WHENEVER A DEFENDANT IS ALLEGED TO BE A CONSPIRATOR IN A MARIJUANA GROW OPERATION WITHOUT ANY FACTUAL DEMONSTRATION THAT THE RESIDENCE IS CONNECTED WITH THE ALLEGED CRIMINAL CONDUCT. SHOULD THE SUPREME COURT RESOLVE THIS IMPORTANT FEDERAL QUESTION WHICH IS IN CONFLICT WITH ITS OWN AUTHORITY AS SET FORTH IN ILLINOIS v. GATES?

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI . . . 1

CITATION TO OPINIONS BELOW 1

GROUNDS ON WHICH JURISDICTION INVOKED 1

CONSTITUTIONAL PROVISION INVOLVED . . 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 11

I. A FAIR PROBABILITY THAT CONTRABAND OR EVIDENCE OF A CRIME WILL BE FOUND AT A SPECIFIC PLACE IS NOT DEMONSTRATED BY A MERE ALLEGATION THAT AN INDIVIDUAL IS INVOLVED IN A CONSPIRACY TO TRAFFIC IN A CONTROLLED SUBSTANCE AND DOES NOT MEET THE TOTALITY OF THE CIRCUMSTANCES TEST. 12

A. For a "Fair Probability" that Contraband or Evidence will be Found at a Specific Place, There Must be a Sufficiently Close Nexus between the Contraband or Evidence Sought and the Place to be Searched. 21

B. Ninth Circuit Precedent Supporting Its Decision in this Case is in Direct Conflict with this Court's

Decision in Illinois v. Gates Because it Eliminates the Requirement of a Nexus Between the Contraband or Evidence of a Crime to be Seized and the Place to be Searched 26

C. Exceptions to the Search Warrant Requirement should not Preserve the Evidence Seized from Naplin's Residence 40

CONCLUSION 41

APPENDIX I

I. OPINIONS BELOW I

II. OTHER I

TABLE OF AUTHORITIES

U.S. Supreme Court Cases

Illinois v. Gates,
462 U.S. 213 (1983) 12, 23

Zurcher v. Stanford Daily,
436 U.S. 547 (1978) 22

Federal Cases

United States v. Adcock,
756 F.2d 346 (5th Cir. 1985),
cert. denied, 471 U.S. 1102
(1985) 39

United States v. Alexander,
740 F. Supp. 437 (N.D. Ohio
1990) 32

United States v. Angulo-Lopez,
791 F.2d 1394 (9th Cir.
1986) 18, 27, 32

United States v. Ayers,
924 F.2d 1468 (9th Cir.
1991) 18, 33

United States v. Baldwin,
978 F.2d 1432 (9th Cir. 1993) . 32

United States v. Benevento,
836 F.2d 60 (2nd Cir. 1987),
cert. denied 486 U.S. 1043 . . . 39

United States v. Dicesare,
765 F.2d 890 (9th Cir. 1985) . . 33

United States v. Fannin,
817 F.2d 1379, 1380-82
(9th Cir. 1987) 33, 37

United States v. Flores,
679 F.2d 173 (9th Cir. 1982) . . 27

United States v. Fuesting,
845 F.2d 664 (7th Cir. 1988) . . 37

United States v. Garza,
980 F.2d 546 (9th Cir. 1992) . . 32

United States v. Hawkins,
788 F.2d 200 (4th Cir. 1986),
cert. denied, 479 U.S. 850
(1986) 40

United States v. Hendricks,
743 F.2d 653, (9th Cir. 1984),
cert. denied, 470 U.S. 1006
(1984) 18

United States v. Hernandez-Escarsega,
886 F.2d 1560 (9th Cir. 1989) . 33

United States v. Hove,
848 F.2d 137 (9th Cir.
1988) 29, 41

United States v. Lambert,
771 F.2d 83 (6th Cir. 1985),
cert. denied, 474 U.S. 1034
(1985) 38

United States v. Mendonsa,
989 F.2d 366 (9th Cir.
1993) 35, 36

United States v. Ocampo,
937 F.2d 485 (9th Cir. 1991) . . 33

United States v. Ramos,
923 F.2d 1346 (9th Cir.
1991) 30, 31

United States v. Valenzuela,
596 F.2d 824 (9th Cir.
1979) 26, 27

United States v. Wagner,
884 F.2d 1090 (8th Cir. 1989),
cert. denied, 110 S. Ct. 1829
(1989) 37

United States v. Weber,
923 F.2d 1338 (9th Cir.
1990) 12 14, 15, 19, 31

United States v. White,
766 F.2d 22 (1st Cir. 1985) . . 38

Constitutional Provisions

U.S. Const. amend. IV . 2, 12, 15, 29, 41

Statutory Provisions

21 U.S.C. § 841(a)(1) 2, 3

21 U.S.C. § 846 (1989) 2, 3

28 U.S.C. § 1254 (1989) 2

28 U.S.C. § 1291 (1989) 2

Court Rules

Fed. R. App. P. 4(b) 2

Sup. Ct. R. 10.1(a) 22, 41

Sup. Ct. R. 10.1(c) 36

PETITION FOR WRIT OF CERTIORARI

Petitioner, Wayne R. Naplin, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on August 4, 1993.

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unofficially reported at United States v. Naplin, No. 92-30361 (9th Cir. August 4, 1993) (mem). (Appendix A).

GROUNDS ON WHICH JURISDICTION INVOKED

Petitioner seeks review of the judgment of the U.S. Court of Appeals for the Ninth Circuit entitled United States v. Naplin, No. 92-30361 (9th Cir. August 4, 1993) (mem). Petitioner timely filed a petition for rehearing on August 19, 1993, with the Ninth Circuit. The petition for rehearing was denied on October 18, 1993.

The U.S. Court of Appeals for the Ninth Circuit had jurisdiction over the appeal and the petition for rehearing under Title 28 U.S.C. § 1291, and Fed. R. App. P. 4(b). The U.S. District Court for the Eastern District of Washington also had jurisdiction over this case under 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846. This Court has jurisdiction of this petition under 28 U.S.C. § 1254 (1989).[1]

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

---

[1]Petitioner incorporates by reference Petition for Certiorari filed by John Newsom in United States v. Newsom, No. 92-30376 (9th Cir. August 4, 1993) (mem), a fellow defendant with Wayne R. Naplin.

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from defendant/appellant Wayne R. Naplin's conviction for conspiracy to manufacture/grow over 1000 marijuana plants. CR 1, 39. The charge for which conviction resulted (count 1) arose under the following statutes: 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846.

The incidents giving rise to the indictment took place in the Eastern District of Washington.

B. Course of Proceedings

1. Pre-trial

The pretrial proceedings pertinent to the issues on appeal are described in the Statement of Facts below.

2. Guilty Plea

After his motion to suppress evidence was denied prior to trial (CR 29, 36), Mr. Naplin entered a conditional guilty plea

which preserved his right to appeal the suppression issues. CR 32 and ER Tab O (Order Staying Imposition of Defendant's Imprisonment Pending Appeal).

C. Disposition, Sentence and Bail Status

Pursuant to his guilty plea, Mr. Naplin was sentenced to the mandatory minimum term of ten (10) years imprisonment and five (5) years supervised release following his imprisonment. CR 39.

Because he entered a conditional guilty plea which preserved his right to appeal, Mr. Naplin was allowed to be released pending appeal. ER at Tab O. He currently resides at: Star Route Box 63, Oroville, Washington 98844.

D. Relevant Facts

1. Pretrial Proceedings Pertaining to the Appeal

Mr. Naplin moved prior to trial for the suppression of all evidence derived

from the search of his property on January 11, 1992. CR 15.[2] Hearings on the motion were held before the Honorable Fred L. Van Sickle, Judge, United States District Court for the Eastern District of Washington.

The search arose from events which began the early morning of January 11, 1992 (a few hours after midnight). At that time, Ms. Barbara Clark began repeatedly calling the Oroville Police Department to insist that they immediately remove her 10-year live-in boyfriend from her home. RT 162, 167-171. At the time

---

[2]The following abbreviations are used in this brief: (CR --) refers to the trial court docket sheet number; (ER --) refers to the section in Appellant's excerpt of record and page number; (ER Tab --, Amend.) refers to the section in Appellant's excerpt of record and amendment page number; (RT --) refers to the transcript of proceedings and page number for the May 27 and May 28, 1992, Franks hearing; and, (6/10 RT --) refers to the transcript of proceedings and page number of the June 10, 1992, suppression hearing.

Ms. Clark claimed that her boyfriend, Dennis Frazier, was about to assault her and her son as he had in the past. RT 167-171. Only in the third phone call, after she was told that the police could not immediately remove Mr. Frazier for a potential assault, did Ms. Clark claim that she could provide information about marijuana growing. RT 171. The police indicated to Ms. Clark that they were very interested in the marijuana-growing claim. RT 171, 195, 216-217.

Police reports at the time of the incident noted that Ms. Clark was not making any sense and was making random and unconnected statements. CR 15. Ms. Clark testified at the pretrial hearing that she was highly intoxicated at the time, having consumed two to four beers an hour from 9:00 or 10:00 a.m. the previous morning until 8:00 p.m., then consuming six beers an hour, from 8:00 p.m. until shortly

before she arrived at the police station. RT 164. By the time of the hearing, the police insisted Ms. Clark had not shown any sign of intoxication while at the police station. RT 111, 282, 324. The search affidavits did not make any reference to her intoxicated state. ER, Tab A.

A psychology-trained officer then took Ms. Clark to his home. RT 330. At his home, the officer's wife assisted in obtaining a written statement from Ms. Clark by writing it down for Ms. Clark. RT 320. Ms. Clark testified that the statement was not her words but a paraphrase by the officer and his wife. RT 183, 201.

Agent Fred Bauman used Ms. Clark's allegations to prepare an affidavit for a search warrant. ER, Tab A. The affidavit contains numerous allegations by Ms. Clark about co-defendant John Newsom's plans to

grow marijuana with Mr. Frazier. Appendix E. The only references to Mr. Naplin in the first warrant was the following: "Barbara also advised me that Dennis Frazier, John Newsom, and Wayne Naplin were getting ready to begin a marijuana grow in the basement of Barbara's house." Appendix E, 3. "Dennis Frazier told Barbara Clark that Wayne Naplin was also a partner in the marijuana grow operation and that Wayne Naplin and John Newsom are to receive the marijuana plants when they are harvested." Appendix E, 4.

While Ms. Clark had seen Mr. Newsom deliver marijuana and other drugs to Mr. Frazier, there was no allegation that Mr. Naplin had ever been seen dealing drugs. Ms. Clark had seen Mr. Newsom deliver material for the grow operation to her house, but no such allegation was made about Mr. Naplin. Appendix E, 3-4. While Mr. Frazier had said the plants were

already in existence, he had also said it was Mr. Newsom who was waiting for them to bud. Appendix E, 4. There was no allegation of involvement by anyone other than those mentioned above.

Based on the telephonic affidavit of Agent Fred Bauman, a search warrant for the Clark/Frazier home was first obtained. Appendix E. Marijuana and grow equipment was found. ER, Tab A, 9-10. Frazier admitted knowing Mr. Naplin. ER, Tab A, 10. Agent Bauman then called the warrant-issuing magistrate (Okanogan County District Court Judge David Edwards) and obtained warrants for Messrs. Newsom's and Naplin's residences. ER, Tab A, 7, 10-11. The telephonic affidavit for Messrs. Newsom's and Naplin's residences added boilerplate language about drug traffickers, dealers, and growers in general (ER, Tab A, 7-8), and the information about what was discovered at

the Frazier/Clark residence.

The warrant for Mr. Naplin's residence included language allowing a full search of the entire property for papers and drugs. Appendix G. Despite obtaining the warrant, the county prosecutor advised the police to call the magistrate if they found any drugs at Mr. Naplin's residence. RT 99; 6/10 RT 15-20, 60-62. The prosecutor admitted there was concern about justifying the search as many ways as possible in case it was later challenged. Some of the officers serving the warrant believed it only authorized a search for papers. 6/10 RT 26, 34, 44, 60-62.

Police served the warrant at the Naplin residence and secured the residence and its occupants, including Mr. Naplin. 6/10 RT 45-46. Police claimed that in a "protective sweep" of the outbuildings, in which they were allegedly looking for

other people, the police entered one outbuilding and found over 1000 marijuana plants growing. 6/10 RT 37. They admitted they had no information causing them to believe another person would be there. 6/10 RT 68.

Hours after finding this, Agent Bauman called the magistrate to "amend" his search warrant application. ER, Tab A, Amend. 1. Only at this point did he inform the magistrate that at the prior search of Mr. Newsom's residence that boxes of lamps had been found addressed to Mr. Naplin. Id. Agent Bauman further added the finding of marijuana in the outbuilding on Mr. Naplin's property was during an alleged "protective sweep." ER, Tab A, Amend. 2-3.

REASONS FOR GRANTING THE WRIT

I. A FAIR PROBABILITY THAT CONTRABAND OR EVIDENCE OF A CRIME WILL BE FOUND AT A SPECIFIC PLACE IS NOT DEMONSTRATED BY A MERE ALLEGATION THAT AN INDIVIDUAL IS INVOLVED IN A

CONSPIRACY TO TRAFFIC IN A CONTROLLED SUBSTANCE AND DOES NOT MEET THE TOTALITY OF THE CIRCUMSTANCES TEST.

The appellate court "must ensure that the magistrate had a 'substantial basis' for finding probable cause" in reviewing the search warrant at issue. United States v. Weber, 923 F.2d 1338, 1343 (9th Cir. 1990).

The Fourth Amendment does not permit a search warrant to be any broader than the probable cause on which it is based. 923 F.2d at 1342. Even when a search warrant describes the items to be searched and seized with sufficient particularity, it remains defective when it "seeks items as to which there is no probable cause." 923 F.2d at 1343. "The fourth amendment requires a 'fair probability' that the items searched for will be found" on the property for which the search is ordered. 923 F.2d at 1345; Illinois v. Gates, 462 U.S. 213 (1983).

Here, as in Weber, there was not probable cause to search Mr. Naplin's property. In Weber, the search affiant used general, boilerplate language about pedophiles and one known order of pornography by the defendant in response to a government-generated advertisement for it to obtain a search warrant for a long list of records and criminal items in all of the defendant's property. The general boilerplate allegations were allegedly based on the affiant's law enforcement expertise concerning "pedophiles" and the kind of evidence they would have and where they would have it. The affidavit did not define "pedophile" or indicate how many times pornography had to be ordered to result in the use of the "pedophile" label by the affiant. It did not conclude that the defendant was a "pedophile" or if so, how this had been determined.

Based on the above facts, the Weber Court ruled that the search warrant was unconstitutional. The Court noted that even if there is reason to believe a defendant is involved in some criminal activity, this alone is not sufficient to justify a full search of his property for a long list of records and criminal evidence alleged to belong to all members of a certain category of criminal. Weber, 923 F.2d at 1344 (rejecting the "mechanical reason[ing] that 'some implies more.'") Additionally, the Court found that the indication that the defendant might be involved with criminal pornographic material was not sufficient to establish that he would have evidence of this crime at his property. Indeed, the Court pointed out that treating possible involvement with the crime as identical to probable cause to search one's home for a long list of evidence of

the crime was far too overbroad an interpretation of the Fourth Amendment. 923 F.2d at 1344. The Court rejected the piling on of even reasonable and allegedly "expert" inferences because "virtual certainty becomes probability, which merges into possibility, which fades into chance" when such speculation is allowed to support a search warrant. 923 F.2d at 1345.

It is precisely such speculation which was allowed to support the search warrant of Mr. Naplin's property in the case at bar. The affidavit states that informant Clark simply claimed that Mr. Naplin was <u>going to be</u> a partner in a marijuana grow that was <u>going to</u> occur, and <u>after it did</u> he might receive some of the proceeds. The growing was going to occur at Mr. Frazier and Ms. Clark's house and Ms. Clark saw concrete evidence of Messrs. Frazier and Newsom preparing for

the grow at Ms. Clark's home, along with actual evidence of Messrs. Frazier and Newsom engaging in ongoing drug dealing. There was no allegation that Mr. Naplin had ever been seen by anyone engaging in drug dealing or "trafficking." All that police learned in executing the search at Mr. Frazier's home was that Mr. Frazier did know Mr. Naplin and that Mr. Frazier was involved in drug dealing and growing as alleged by Ms. Clark. The finding of the lamp boxes addressed to Mr. Naplin at Mr. Newsom's home (if this after-the-fact-information can be considered) also added nothing beyond the suspicion that Mr. Naplin was going to be involved in some activity with Messrs. Naplin and Newsom. The reference to Mr. Naplin's children finding marijuana and what he said to them, without any time or place context, is meaningless. Without knowing where or when the children found it, or any other

circumstances of the incident, it establishes nothing about whether Mr. Naplin is a drug dealer, trafficker or grower at the time of the search.

The above facts show that the search warrant here lacked probable cause as in Weber, and the same invalidity of the warrant as in Weber should be ordered. In both cases, there is some indication of involvement in criminal activity in the future or past, but insufficient probable cause for a search of the defendant's property for a long list of items at the time of the search. In both cases there is the possibility of past or future criminal involvement but NOT a factual basis for putting the defendant in the relevant criminal category such as "dealer" or "trafficker." There is no nexus between the evidence sought and the place to be searched because the defendant's present identity in the

criminal category which establishes the nexus is absence. See United States v. Hendricks, 743 F.2d 653, 655-56 (9th Cir. 1984), cert. denied, 470 U.S. 1006 (probable cause to arrest and probable cause for search are not identical, and whether particular evidence will be found at residence based on what is known about particular defendant must be considered.). Thus the cases cited by the prosecution and the district court, allowing searches of the residences of "drug dealers and traffickers," have no application. See for example United States v. Angulo-Lopez, 791 F.2d 1394, 1399 (9th Cir. 1986); United States v. Ayers, 924 F.2d 1468, 1479 (9th Cir. 1991). On the facts here, it was not reasonable to search for the long list of items listed in the affidavit at Mr. Naplin's home, because there were no facts showing that Mr. Naplin was a drug dealer. The magistrate's conclusion

of probable cause and the district court's ruling upholding the search lacked a substantial basis, justifying reversal of the appellate court.

In both the instant case and Weber, it is irrelevant that the affiant claims to have expertise in knowing what kind of evidence will be found on the property of persons in that criminal category because there is no basis for knowing the defendant fits that category. The "rambling boilerplate recitations designed to meet all law enforcement needs" and not drafted with the facts of the case at bar or the particular defendant in mind do not establish probable cause. 923 F.2d at 1345. It simply serves to mislead the magistrate by covering up the lack of particularized substance in the search affidavit. 923 F.2d at 1346: boilerplate allegations "added fat to the affidavit, but certainly no muscle." This was

particularly a problem here where the magistrate was presented with repeated, similar telephonic information and the first two warrants for Messrs. Frazier and Newsom's properties may have been supported by probable cause, but the third one "piggy-backed" on for Mr. Naplin was not.

Weber is further controlling authority in that the good faith exception does not apply and suppression should be ordered. As Weber point out, good faith is assessed by an objective standard applied to the officers who originally obtained the warrant in addition to those who execute it. The process by which the warrant is obtained is evaluated. The process of obtaining the warrant here showed ample time for deliberation; the police had time to consult the prosecutor and develop a plan for justifying the search knowing that it would be legally

challenged. The government admitted taking the unusual step of contacting the magistrate after evidence was found on Mr. Naplin's property; apparently it did not do this for the Frazier or Newsom warrants. Agent Bauman claimed the informant told him the plants might be at Mr. Naplin's residence but he chose to exclude this from the affidavit. All of this evidence negates good faith and shows the police themselves knew it was speculation as to whether any evidence would be at Mr. Naplin's residence. Pursuant to Weber, suppression should have been ordered.

A. For a "Fair Probability" that Contraband or Evidence will be Found at a Specific Place, There Must be a Sufficiently Close Nexus between the Contraband or Evidence Sought and the Place to be Searched.

The United States Court of Appeals for the Ninth Circuit has committed an

error of law in deciding that probable cause existed for the Naplin search warrant. Certiorari should be granted under Sup. Ct. R. 10.1(a) because the Ninth Circuit's ruling in this case represents a significant departure from established federal law. The critical element in a reasonable search is reasonable cause to believe that the "things" to be searched for and seized are located on the property to be searched. Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978). The Ninth Circuit departs from this well-established principal of federal law because it allowed Naplin's status as an alleged conspirator to be the primary basis for inferring probable cause.

> Similarly, Judge Edwards could have reasonably inferred that marijuana or other physical evidence relating to the conspiracy would be found at Naplin's residence because Naplin was a member of the

> conspiracy and was to receive a portion of the plants which were already in existence.

United States v. Naplin, No. 92-30361 at 2 (9th Cir. Aug. 4, 1993) (mem).

The Naplin Court's ruling relies on an allegation of conspiracy and on a further allegation that Naplin would receive contraband plants in the future. However, established federal law will support a probable cause determination only if, given all the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). If an allegation of conspiracy will support probable cause to search, the process of arriving at probable cause to issue a search warrant is reduced to a charging formality---once the accused is charged, her property may be searched.

Furthermore, it is difficult to see

how the allegation of future acquisition of plants by Mr. Naplin creates a nexus with Mr. Naplin's residence for the search. First, the gravamen of the conspiracy was a marijuana grow operation in Mr. Frazier's and Ms. Clark's (on whose statements the search warrant was largely based) residence---not Mr. Naplin's. (ER CR 29 at 5.) This maybe an indication that Mr. Naplin would be transporting contraband, but it does not support a nexus with Mr. Naplin's residence precisely because the ultimate destination for the marijuana plants was Mr. Frazier's residence.

Second, the allegation that Mr. Naplin would receive marijuana plants in the future adds nothing to the determination of probable cause to issue the search warrant. Probable cause must exist at the time of issuance of the search warrant in order to search said

residence. Evidence of crime that will occur in the future does not warrant probable cause for an immediate search since probable cause has not been created yet.

Third, even if the allegation that Mr. Naplin was involved in some type of criminal activity is sufficient to create probable cause for his arrest, it does not provide probable cause to search a particular place under the present facts. If there was reasonable suspicion only as to Mr. Naplin's alleged future criminal actions, which would be relevant for his arrest, this certainly does not provide probable cause to search his home. Mr. Naplin was alleged to be a partner and would receive marijuana plants sometime after they had matured. These are allegations of possible crime occurring in the future but not currently existing. The likelihood of some future criminal

activity simply does not increase the present likelihood that a defendant has the fruits of criminal activity at his residence because there is no nexus between the activity and the residence.

B. Ninth Circuit Precedent Supporting Its Decision in this Case is in Direct Conflict with this Court's Decision in Illinois v. Gates Because it Eliminates the Requirement of a Nexus Between the Contraband or Evidence of a Crime to be Seized and the Place to be Searched.

Early Ninth Circuit precedent was in accord with Gates' requirement that a nexus exist with the place to be searched. In United States v. Valenzuela, 596 F.2d 824 (9th Cir. 1979), the Ninth Circuit held that facts supporting a search warrant must show probable cause to believe that criminal objects are presently in the place to be searched. 596 F.2d at 828. The Ninth Circuit agreed that it does not follow that probable cause to believe the suspect is guilty

translates into probable cause to search his residence. Id. See also United States v. Flores, 679 F.2d 173, 175 (9th Cir. 1982) (a search warrant may be sustained only if there is a sufficient relationship connecting the crime, the thing to be seized, and the place to be searched).

However, in 1986, the Ninth Circuit decided United States v. Angulo-Lopez, 791 F.2d 1394 (9th Cir. 1986.) In that case, the Ninth Circuit held that probable cause to search exists if the traffickers in question consist of a ringleader and his assistants since a fair probability exists that drugs will be present at the assistants' residence and at the ringleader's too. 791 F.2d at 1399. In essence, the Ninth Circuit created a special class of defendants for whom no nexus need be established---drug traffickers. But the necessary corollary

of this approach is to collapse probable cause for arrest with probable cause to search a defendant's residence. Such a collapsing completely removes any requirement of a nexus between the contraband or evidence of a crime to be seized and the property to be searched because probable cause now becomes personal to the defendant and follows him wherever he goes.

In a limited sense only, this makes sense---it does not offend logic to allow a search of the person and the zone of control of that person incident to arrest. But Angulo-Lopez supports a much broader proposition than this---if a defendant is a drug trafficker, any place where she may be found can be searched. This is inconsistent with Gates because it would convert the law to read that probable cause exists if, given all the circumstances, there is a fair probability

that the defendant is a drug trafficker. Such a reading of the law denies any vestige of the Fourth Amendment protection against unreasonable searches and seizures---at least as to alleged drug traffickers. The Ninth Circuit cites to Angulo-Lopez for authority that this inference may properly be made to establish probable cause to search Naplin's residence.

However, in cases not involving drug traffickers, the Ninth Circuit has continued to require that affidavits supporting search warrants justify searching a particular place by explaining the significance or relevance of that location. United States v. Hove, 848 F.2d 137, 139 (9th Cir. 1988) (bomb threat case). There is no reason why drug traffickers should receive a radically different probable cause process as compared to other defendants.

Moreover, it is not even clear that the Ninth Circuit applies Angulo-Lopez uniformly to drug traffickers. For instance, in a money laundering and cocaine possession case, the Ninth Circuit held that probable cause to believe that the suspect has committed a crime is not by itself adequate to secure search warrant for the suspect's home; there must be reasonable cause to believe that things listed as objects of the search are located in the place to be searched. United States v. Ramos, 923 F.2d 1346, 1351 (9th Cir. 1991). About the only significant distinguishing factor between Angulo-Lopez and Ramos is that the "good faith" exception saves the defective warrant in Ramos and prevents application of the exclusionary rule. 923 F.2d at 1353. It is untenable for the Ninth Circuit to apply such a result-oriented double standard to alleged drug

traffickers---giving such defendants a level playing field on probable cause only if one of the exceptions to the exclusionary rule applies to allow the fruits of the search and seizure into evidence. Such analysis greatly confuses the law and warrants review by this Court.

"Probable cause to believe that a suspect has committed a crime is not by itself adequate to secure a search warrant for the suspect's home." United States v. Ramos, 923 F.2d 1346, 1351 (9th Cir. 1991). The place to be searched is not per force tainted by its connection with the person committing the criminal activity and there must also be probable cause to believe that "incriminating items are located on the property to which entry is sought." 923 F.2d 1346, 1351; see generally Weber, 923 F.2d 1338, 1343-44. Contrary to these settled propositions, the Ninth Circuit has been quietly

developing a doctrine which presumes that drug dealers operate out of their homes and further presumes that evidence of trafficking will invariably be found wherever the trafficker is found. See United States v. Alexander, 740 F. Supp. 437, 447 n.8 (N.D. Ohio 1990) (collecting cases).

The doctrine appears in four variations. The first is that line of cases which observe in dicta that drug dealers typically maintain evidence of their trafficking at home. United States v. Baldwin, 978 F.2d 1432, 1435 (9th Cir. 1993); United States v. Garza, 980 F.2d 546, 551 (9th Cir. 1992); United States v. Angulo-Lopez, 791 F.2d 1394, 1399 (9th Cir. 1986). These authorities are dicta because there was in each instance at least some independent evidence of probable cause to believe that a suspect's residence was linked to the drug trade.

The second line of authority sub silentio applies the presumption but does not enunciate it as a rule of law. United States v. Dicesare, 765 F.2d 890, 896-97 (9th Cir. 1985).

The third line reaches the same result by relying on the affiant's expertise as a seasoned narcotics investigator. If the affiant recites that based on his or her training and experience, there is reason to believe that drug dealers routinely maintain their wares and evidence of transactions at their homes, then there is at least an aura of legitimacy to inferring probable cause. United States v. Ocampo, 937 F.2d 485, 490 (9th Cir. 1991); United States v. Ayers, 924 F.2d 1468, 1478-79 (9th Cir. 1991); United States v. Hernandez-Escarsega, 886 F.2d 1560, 1567 (9th Cir. 1989); United States v. Fannin, 817 F.2d 1379, 1380-82 (9th Cir. 1987).

The final line of authority is represented by the instant case. Agent Bauman set out his experience and background and asked the issuing magistrate to draw certain inferences. ER, Tab A. Conspicuous by its absence is any reference to the inference which the magistrate drew, which is that Mr. Naplin's involvement in a drug conspiracy tainted his home. Cf. Ayers, 924 F.2d at 1479. Agent Bauman merely stated there was probable cause to arrest; ergo he wanted a search warrant. ER, Tab A. The magistrate could find probable cause only by sua sponte taking judicial notice that drug dealers operate out of their homes and maintain contraband or other incriminating evidence on the premises. The reviewing court at the trial level found itself in the same position when it held that because the marijuana growing paraphernalia "had to come from somewhere"

the magistrate's inference was substantially justified. CR 29. So did the appellate panel when it bodily lifted the dicta from Anglo-Lopez and applied it to the facts at bar. No. 92-30361 at 2.

Such use of judicial notice might be a valid tool were the standard "possible cause." Certainly it is always possible that one engaged in criminal conduct might secrete evidence of the crime in his house, or car or place of business. But while probable cause is becoming an increasingly relaxed concept, it still requires more than might be's, could be's, and maybe's. Beyond rank speculation, it requires a "fair probability" that what is sought will be found in the place where it is sought. United States v. Mendonsa, 989 F.2d 366, 368 (9th Cir. 1993), quoting Illinois v. Gates, 462 U.S. 213, 238 (1983). Moreover, it must be reasonable to seek what is sought in the place where

sought. Ocampo, 937 F.2d at 490. It is tautological that the reasonableness of an action can be tested only if the record reflects some reason supporting the action taken; and here there is none other than the presumption that in the drug context, probable cause to arrest is probable cause to search.

Certiorari should be granted pursuant to Sup. Ct. R. 10.1(c) in that this is a "pure presumption" case with clean facts, a narrow issue and the question presented is of widespread import to law enforcement and accused persons alike. The presumption is inconsistent with the "fair probability" standard announced by this Court in Gates. If Angulo-Lopez and its progeny are the law of the land and criminal activity per se sufficiently taints a suspect's dwelling to justify issuance of a search warrant, this Court should declare as much. If not the law of

the land, then, the Court should put an end to this mischievous aberration.

In all the cases found by Petitioner there was some type of independent evidence, (whether it be an ongoing police investigation, informant witnesses revealing criminal activity of others, or irritated neighbors coming forward to report suspicions of crime in their neighborhoods), beyond the allegations of criminal activity. See United States v. Wagner, 884 F.2d 1090 (8th Cir. 1989), cert. denied, 110 S. Ct. 1829 (1989) (18-month investigation leading to controlled delivery and traced route of chemicals and glassware to house); United States v. Fannin, 817 F.2d 1379 (9th Cir. 1987) (DEA agent's firsthand knowledge of defendant's involvement in drug trafficking); United States v. Fuesting, 845 F.2d 664 (7th Cir. 1988) (Aerial observations made by police helicopter of open curtilage surrounding

defendant's home and marijuana field growing adjacent to curtilage, coupled with statements of defendant's wife); United States v. Lambert, 771 F.2d 83, cert. denied, 474 U.S. 1034 (6th Cir. 1985) (affidavit in support of search warrant detailed housekeeper's eyewitness account of defendant's extensive use of illegal drugs at his home and his meeting with persons who appeared to be drug dealers, and recounted wiretap evidence indicating that defendant was using and purchasing cocaine and was likely involved in drug dealing); United States v. White, 766 F.2d 22 (1st Cir. 1985) (affidavit stating that reliable informant provided agent with telephone number at which defendant's mother could be reached, that both mother and defendant were seen leaving and entering premises for which telephone number was listed on several occasions, that mother agreed to deliver

three kilograms of cocaine to agent, that mother was seen leaving the premises with white paper bag similar to one which she handed to agent shortly thereafter, that bag contained much less than three kilograms of cocaine, and that agent believed that more cocaine was to be found in the premises); United States v. Benevento, 836 F.2d 60 (2nd Cir. 1987), cert. denied 486 U.S. 1043 (1987) (affidavits in support of search warrant containing extensive testimony as to defendants' involvement in an international narcotics conspiracy); United States v. Adcock, 756 F.2d 346 (5th Cir. 1985), cert. denied, 471 U.S. 1102 (1985) (facts in affidavit stating that cab driver had delivered defendant to address without charging a money fare, that cab driver's claim not to know defendant was false, that the premises were frequented by persons having

connections with drug smuggling); United States v. Hawkins, 788 F.2d 200 (4th Cir. 1986), cert. denied, 479 U.S. 850 (1986) (fifty pages of affidavit indicating that drugs were distributed at defendant's nightclub and setting forth defendant's activity).

There is not one iota of evidence that Mr. Naplin is a drug trafficker. He has never been arrested or convicted of drug trafficking.

C. Exceptions to the Search Warrant Requirement should not Preserve the Evidence Seized from Naplin's Residence.

In Hove, a bomb threat case, the Ninth Circuit ruled that a search warrant affidavit that never linked the suspect or his criminal activity to the residence was so deficient that official belief in the existence of probable cause was unreasonable and therefore the deputy sheriff executed the warrant in bad faith.

848 F.2d at 139-40. This is certainly consistent with Gates' nexus requirement. However, the Ninth Circuit's abandonment of the nexus requirement for drug traffickers denies those accused of trafficking or conspiracy to traffic in drugs the protections of the Fourth Amendment.

Given that the Ninth Circuit's interpretation of the law is at variance with Gates, this Court should grant certiorari pursuant to Sup. Ct. R. 10.1(a) to insure the continued adherence to its precedent in Illinois v. Gates.

CONCLUSION

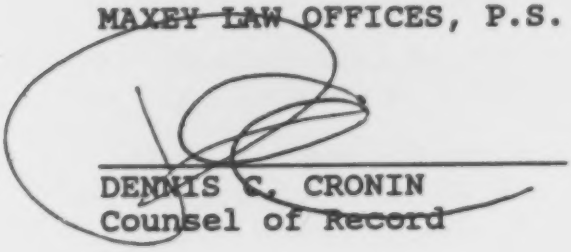
Pursuant to Supreme Court Rules 10.1(a) and 10.1(c), to provide guidance to the lower federal courts on issues for which there is a conflict among the circuits, and to resolve an important issue of constitutional law, Petitioner requests that a Writ of Certiorari be

issued to the Ninth Circuit to review its opinion and order in the case at bar.

DATED this 13th day of January, 1994.

Respectfully Submitted,

MAXEY LAW OFFICES, P.S.



DENNIS C. CRONIN
Counsel of Record

APPENDIX

I. OPINIONS BELOW

Appendix A: Order Denying Petition for Rehearing, No. 92-30361 (9th Cir. October 18, 1993)

Appendix B: Memorandum, No. 92-30361 (9th Cir. August 4, 1993)

Appendix C: Order Denying Motion to Suppress, No. CR-92-100-FVS, (E.D. Wash. June 9, 1992)

Appendix D: Supplemental Order Denying Motions to Suppress and for Hearing on Co-Conspirator Statements, No. CR-92-100-FVS, (E.D. Wash. June 22, 1992)

II. OTHER

Appendix E: Affidavit for Search Warrant, Re: 403 Main Street, Oroville, WA (Dennis Frazier's residence)

Appendix F: Affidavit for Search Warrant, Re: Star Route, Box 20-1, Oroville, WA (John Newsom's residence)

Appendix G: Search Warrant, Re: Star Route, Box 63, Oroville, WA (Wayne Naplin's residence)

APPENDIX A

Filed October 18, 1993
Cathy A. Catterson, Clerk
U.S.Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WAYNE NAPLIN, Defendant-Appellant.	No. 92-30361 D.C. CR-92-100-FVS
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHN NEWSOM, Defendant-Appellant.	No. 92-30376 D.C. No. CR-92-102-FVS ORDER

Before: CANBY, WIGGINS, and T.G. NELSON, Circuit Judges.

The panel has voted to deny Appellants' petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc and no active judge has requested a cote on whether to rehear the matter en banc. Fed. R.App. P. 35(b).

The petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

APPENDIX B

Filed August 4, 1993
Cathy A. Catterson, Clerk
U.S.Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WAYNE NAPLIN, Defendant-Appellant.	No. 92-30361 D.C. CR-92-100-FVS
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHN NEWSOM, Defendant-Appellant.	No. 92-30376 D.C. No. CR-92-102-FVS MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Fred Van Sickle, District Judge, Presiding

Argued and Submitted July 13, 1993
Seattle, Washington

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: CANBY, WIGGINS, and T.G. NELSON, Circuit Judges.

We conclude that the district court did not err in refusing to suppress the marijuana seized at Naplin's residence. Given the totality of circumstances in this case, we hold that Judge Edwards had a substantial basis for concluding that probable cause existed. See, United States v. Miller, 753 F.2d 1475, 1479 (9th Cir. 1985); see also United States v. Ayers, 924 F.2d 1468, 1478 (9th Cir, 1991) (this court shows deference to issuing judge's probable cause determination.)

Clark's reliability and the basis of her knowledge were established. She provided a detailed description of the proposed marijuana grow operation; much of the information she supplied to the police based upon her personal knowledge; and her information was corroborated by the Frazier search. See Miller, 753 F.2d at 1480. Moreover, the fact that some of the

information Clark provided was hearsay does not preclude a probable cause finding, so long as the circumstances suggest veracity and the hearsay carries indicia of reliability. See United States v. Angulo-Lopez, 791 F.2d 1394, 1397 (9th Cir. 1986). Both Frazier's and Newsom's hearsay statements were reliable because they were statements against penal interest. See id.

Clark's statement established both Naplin's and Newsom's involvement. Because the plants were in existence and because Newsom had already given some marijuana to Frazier, Judge Edwards could have reasonably inferred that more would be found on Newsom's premises. See id. at 1139. Similarly, Judge Edwards could have reasonably inferred that marijuana or other physical evidence relating to the conspiracy would be found at Naplin's residence because Naplin was a member of the conspiracy and was to receive a

portion of the plants which were already in existence. See id. ("in the case of drug dealers, evidence is likely to be found where the dealers live. When the traffickers consist of a ringleader and assistants, a fair probability exists that drugs will be present at the assistants' residence[s] as well as the ringleader's." (citations omitted)).

We next conclude that the district court did not err in refusing to suppress evidence obtained at both the Naplin and Newsom residence pursuant to Franks v. Delaware, 438 U.S. 154 (1978). It did not clearly err in finding that the omissions were neither deliberate nor reckless. See United States v. Dozier, 844 F.2d 701, 705 (9th Cir.), cert. denied, 488 U."S. 927 (1988). Clark was a conditioned drinker and although she was intoxicated when she arrived at the Oroville Police Department, she did not exhibit signs of intoxication.

Finally, we reject Naplin's

contention that the officers conducted an invalid protective sweep. We agree with the district court's conclusion that the outbuilding search fell within the scope of the Naplin search warrant. When seeking to obtain a search warrant for the Naplin residence, Agent Bauman described the premises to be searched as "a trailer house with a metal barn next to it[,] . . . including all the curtilege of said premises and all outbuildings, sheds, garages and any other buildings on the curtilege and premises attached or unattached." Judge Edwards then authorized the search of "Wayne Naplin's house." Although Naplin argues this language limited the search warrant to the house, it is more reasonable to interpret this language as descriptive. Given the entire telephonic exchange and the fact that Judge Edwards was issuing two warrants during the same conversation, it seems apparent that the was merely stating

which particular warrant he was authorizing. Consequently, because the officers' search of the outbuildings feel within the permissible scope of the search warrant, we need not reach the protective sweep issue.

AFFIRMED.

APPENDIX C

Filed in the
U.S. District Court
Eastern District of Washington
June 9, 1992
James R. Larsen, Clerk
_____ Deputy

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, vs. WAYNE R. NAPLIN, Defendant.	NO. CR.92-100-FVS ORDER DENYING MOTION TO SUPPRESS

BEFORE THE COURT is the defendant's motion to suppress (Ct. Rec. 15). Beginning on May 27, 1992, the Court held a two-day evidentiary hearing to resolve factual disputes raised by the defendant's motion. The defendant was present, together with his attorney, Bevan J. Maxey. The government was represented by Assistant United States Attorney Timothy J. Ohms.

BACKGROUND

Barbara Clark resides at 403 Main St., Oroville, Washington, with her boyfriend, Dennis Frazier, and her three children. The oldest child, Taylor, is Ms. Clark's by a prior relationship. The two younger children were born of Ms. Clark's relationship with Mr. Frazier.

On January 10, 1992, Ms. Clark and Mr. Frazier hosted a barbecue at their residence. During the course of the evening, a number of those present (including Ms. Clark and Mr. Frazier) became intoxicated.

By the time the party broke up, Mr. Frazier had become quite angry with one of the guests (a Mr. Les Wisdom). Ms. Clark, in turn, began to fear for her safety since she had been abused repeatedly by Mr. Frazier and had learned to identify the signs of an impending assault. Not wanting to be victimized again, she

slipped out of the house between midnight and 12:30 a.m. and went to Mr. Wisdom's residence. There, she made a series of three telephone calls to the Oroville police.

According to police records, the calls began about 1:13 a.m. on January 11, 1992. The dispatcher noted that the caller was extremely upset and that although she complained of abuse, she refused to give either her name or address.

Mr. Wisdom returned to his residence a few minutes after the third call, and suggested that he escort Ms. Clark back to her home. When they arrived, Mr. Frazier began to yell and scream at Mr. Wisdom. With Mr. Frazier's attention thus diverted, Ms. Clark left and went back to Mr. Wisdom's house. Mr. Wisdom soon returned and drove her to a point near the Oroville police station where he dropped

her off. She walked to the station from there, arriving at approximately 2:30 a.m.

The first police officers to have contact with Ms. Clark were Allen Lewis and Frank May. To them, she appeared to be deeply distraught, occasionally verging on incoherence. Consequently, they had difficult understanding her.

For her part, Ms. Clark wanted the police to remove Mr. Frazier from her residence. The officers declined to do so, however, because Mr. Frazier had not actually assaulted her. When Officer Allen Lewis tried to explain, Ms.Clark finished the sentence he had begun, and walked out of the station slamming the door behind her.

Once outside, Ms. Clark hid in an alley while the officers went to look for her. After a while, she returned to the steps of the police station where she tried to "regroup." She was still sitting

on the steps when the officers came back to the station.

This time, Officer Frank May spoke to Ms. Clark. He calmed her to the point that she was willing to tell him who she was and why she was at the station. Eventually, he convinced her to come inside, although she was remained quite agitated. According to his report, "It became apparent that she was near panic and in fear of her personal safety, as well as the safety of her children." (Report of Officer Frank A. May, at 3-4.) During her more lucid moments, however, Ms. Clark made comments which suggested that "a marijuana grow [was] being set up at her house." Id. at 44. Believing that she had more to tell, Officer May called Mike Nelson, a reserve officer who was skilled at working with persons in crisis.

Officer Nelson got to the station about 3:30 a.m. and spent the next two

hours talking to Ms. Clark. During that time, she described a plan to grow marijuana. Because of her disclosure, Officer Nelson called Border Patrol Agent Fred Bauman (a member of the North Central Washington Narcotics Task Force) and asked him to come to the police station.

Agent Bauman arrived at about 5:30 a.m. By that time, Ms.Clark had become concerned that she would be seen at the station. To allay her fears, Officer Nelson took her to his home (where his wife was present).

While Ms. Clark was at the Nelson home, the officers obtained a three and one-half page, signed statement from her. Although the document is handwritten, the printing is not Ms. Clark's. According to the testimony of those present, Mrs. Nelson acted as a scribe while Ms. Clark spoke. Periodically, Mrs. Nelson repeated what she had written to confirm that it

was correct. Ms. Clark signed each page, acknowledging its accuracy.

Thereafter, Agent Bauman left to make arrangements to search Ms. Clark's residence.[1] At about 11:00 a.m., he telephoned an Okanogan County district court judge to apply for a warrant. During the call, Agent Bauman told the judge that he had learned the following:

On January 9, 1993, Mr. Frazier told Ms. Clark that he intended to use his pickup "to haul the marijuana growing equipment to the house." However, Mr. Frazier's truck would not run, so he went

---

[1]Ms. Clark may have consented to a search of her residence. (Transcript of Telephonic Search Warrants, at 4.) If so, a warrant may have been unnecessary. See, e.g., United States v. Childs, 944 F.2d 491 45 (9th Cir.1991) (where person with common authority consents, "warrantless search is valid without a showing that other persons who have a right to equal possession also consented"). The government has not attempted to justify the search of the Clark/Frazier residence on that basis, however.

to Oroville High School where he borrowed a truck from Pamela Newsom. He then picked up John Newsom, and obtained tables, boxes, and building materials from some undisclosed source. These he put in Ms. Clark's house. (Transcript of Telephonic Search Warrants, at 3.)

John Newsom "told Dennis Frazier and Barbara Clark that he would pay them seven thousand dollars to grow marijuana[,] and that he would pay all the utility bills." Id.

Dennis Frazier told Barbara Clark that Wayne Naplin was a partner in the operation, and that Messrs. Naplin and Newsom were to receive the plants when harvested. Mr. Frazier also said that the plants which they were to grow were already in existence, but that it would be about one month before they could be transported to the house. Id.

John Newsom told "Barbara Clark that

[he] was waiting for the plants to bud before they could be brought to the house. Dennis Frazier is to use this time period to prepare the basement grow room for the marijuana plants." Id. at 3-4.

Finally, approximately one week before, Ms. Clark discovered "a red and white cooler in her closet with D. Frazier written on the lid. When Barbara looked inside the cooler[,] she found approximately two pounds of marijuana.

When she asked Dennis Frazier about the marijuana[,] Dennis told her that John Newsom had given it to him to sell." According to Ms. Clark, the marijuana was still in her closet. (Transcript of Telephonic Search Warrants, at 4.)

Based upon the facts recited by Agent Bauman, the judge issued a search warrant for the house shared by Ms. Clark and Mr. Frazier. The law enforcement officers who executed the warrant found the evidence

and contraband which Ms. Clark had described in the locations in which she said they would be. As a result, Agent Bauman re-contacted the judge by telephone at about 5:30 p.m. He repeated the facts presented during the first telephone call, and then represented the results of the search. He also told the judge that, at some point prior to the time Ms. Clark came forward, her oldest son found the marijuana in the cooler. "Dennis Frazier instructed Barbara Clark to tell Taylor what Wayne Naplin tells his children when they find marijuana. Do you wanna [sic] new bike? If you do, then keep your mouth shut." (Transcript of telephonic Search Warrants, at 10.)

Agent Bauman requested two additional warrants. One for the residence of John and Pamela Newsom; the other for the residence of Wayne Naplin and Judy Lien. Both warrants were issued.

FRANKS HEARING

Franks v. Delaware, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 2676, 57 L.Ed.2d 667 (1978), has been extended to include deliberate or reckless omissions. United States v. Stanert, 762 F.2d 775, 781, amended, 769 F.2d 1410 (9th Cir.1985). Thus, the fruits of a search must be suppressed where a defendant establishes, by a preponderance of the evidence, that the affiant deliberately or recklessly omitted facts from the affidavit which were necessary to prevent the affidavit from being misleading, id. and that had the facts been added to the affidavit, the magistrate would not have been able to find probable cause, United States v. Ippolito, 774 F.2d 1482, 1486 n.1 (9th Cir. 1985).[2]

---

[2]This, of course, assumes the defendant has standing. To have standing, the defendant must establish that he or she "had a 'legitimate expectation of

Omissions Alleged

The defendants allege that Agent Bauman failed to disclose the following: that Ms. Clark's true motive for coming to the Oroville police station was her desire to have Dennis frazier removed from her residence; that not only was Ms. Clark intoxicated, but she was also distraught to the point of incoherence; that statements attributed to John Newsom were in fact made by Dennis Frazier; that Ms. Clark denied Pamela Newsom was involved in the operation; and that Ms. Clark told

---

privacy' in the place searched or the property seized." United States v. Padilla, Nos. 90-10311 and 90-10316, slip op. 3385, 3394 (9th Cir. April 1, 1992) (quoting Rakas v. Illinois, 439 U.S. 128, 143-44 (1978)). The mere fact that the defendant is charged with conspiracy is not sufficient to create such an expectation. See Padilla, at 3400. Nevertheless, "a coconspirator's participation in an operation or arrangement that indicated joint control and supervision of the place searched establishes standing." Id. at 3395 (citations omitted). Here, the parties have yet to address the issue.

Officer May that John Newsom had provided Dennis Frazier with three pounds of marijuana to sell, whereas she told Agent Bauman that Newsom had provided approximately two pounds.

Findings Regarding Omissions

1. Motive

The transcript of Agent Bauman's first conversation with the Okanogan County district court judge indicates that Barbara Clark told him "that her boyfriend, Dennis Frazier, had been beating her and Barbara's oldest son, Taylor." (Transcript of Telephonic Search Warrants, at 3.) Thus, the issuing judge was apprised of the fact that Ms. Clark came forward, at least in part, because of a fear of domestic violence.

2. Intoxication/Emotional State

Ms. Clark is a conditioned drinker. Although she was intoxicated when she arrived at the Oroville police station,

she did not exhibit the symptoms normally associated with drunkenness. (By her own admission, she was attempting to conceal her intoxication.) As a result, there was no reason for the officers to be concerned about Ms. Clark's state of sobriety.

Ms. Clark was extremely agitated when she arrived at the police station, occasionally lapsing into incoherence. Her emotional state was not the product of mental disease or defect, however. To the contrary, it appears to have been the combined result of alcohol consumption, a rational fear of assault, and concern for her children's welfare.

After Officer Nelson arrived at the station at 3:30 a.m, Ms. Clark began to calm down. She was entirely lucid by the time Mrs. Nelson began to record her statement. The Court specifically finds that neither Ms. Clark's alcohol consumption nor her emotional state

prevented her from perceiving, recalling, or describing events accurately.

3. Accuracy of Statement

The officers (and Mrs. Nelson) dutifully recorded the information which Ms. Clark provided to them. Not only was each paragraph read back to Ms. Clark, but she was asked to sign each page to attest to its accuracy. Consequently, the three and one-half page declaration taken from Ms. Clark is a reliable record of the statements which she made to the officers.

Conclusions Regarding Omissions

Given the information which was reasonably available to the officers, there was no reason for them to believe that the facts omitted from the affidavit would mislead the judge regarding either Ms. Clark's credibility, or her ability to perceive, recall, or describe. Thus, the omissions at issue here cannot be characterized as deliberate or reckless.

At the very worst, they were negligent. See, e.g., United States v. Dozier, 844 F.2d 701, 705 (9th Cir.1988) (affiant overstated extent of defendant's prior convictions, and included fact which affiant's investigation had shown to be untrue), cert. denied, 488 U.S. 927, 109 S.Ct. 312. 102 L. Ed. 331 (1988); United States v. Miller, 753 F.2d 1475, 1478 (9th Cir. 1985) (affiant failed to uncover informant's perjury convictions).

None of the other facts which were omitted were material to a finding of probable cause. It was unnecessary to establish that Pamela Newsom was involved in the scheme to justify a search of the Newsom residence. Nor was it significant that Ms. Clark may have told one officer that she had seen three pounds of marijuana in the cooler, whereas she told another that she had observed approximately two pounds.

LOSS OF TAPE RECORDING

Ms. Clark testified that Officer Nelson attempted to take a taped statement. According to her, the tape-recorder was approximately six inches by eight inches. She specifically recalled hearing her voice on tape.

Officer Nelson acknowledged that he tried to tape-record her statement. He testified that he used a "boom box," a much larger recorder. He could not make the recorder work properly, however. According to him, the tape contained nothing more than a hiss.

Findings Regarding Tape

The Oroville Police Department owns a small, grey, portable tape-recorder. During the morning of January 11, 1992, it was not available for use. However, a "boom box" was present in the station that morning. Officer Nelson attempted to use it to take a tape-recorded statement from

Ms. Clark, but was unable to make the "boom box" record properly. Nothing of substance was ever recorded on the tape.

Conclusions Regarding Tape

The defendants collectively contend that the loss of the tape-recorded statement has prevented them from demonstrating the extent of Ms. Clark's intoxication and emotional distress. Although not expressly stated, their argument implies that they have been denied due process of law. The defendants have failed to show, however, that Officer Nelson ever recorded anything germane to the inquiry at hand. Thus, even if the Court accepted Ms. Clark's recollection of the incident, the tape would have been (at best) potentially exculpatory. That being the case, the defendants must show both bad faith and prejudice to establish a denial of due process. Because the defendants have done neither, they cannot

establish a denial of due process. See Arizona v. Youngblood, 488 U.S. 51, 55-57, 109 S.Ct. 333, 336-37. 102 L.Ed.2d 281 (1988); United States v. Dring, 930 F.2d 687, 693 (9th Cir.1991). See also United States v. Rodriguez, 917 F.2d 1286, 1291-92-)11th Cir. 1990) (loss of seven audio tapes did not deny due process absent showing of bad faith), amended, 935 F.2d 194 (11th Cir. 1991), cert. denied _____ U.S. _____, 112 S.Ct. 911, 116 L.Ed 2d 811 (1992).

PROBABLE CAUSE FOR SEARCHES

The task of the issuing judge was to determine whether there was "a fair probability" that either contraband or evidence of a crime would be found in each place which Agent Bauman asked to search. Illinois. V. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983). The judge's decision to issue the warrants is now entitled to "'great deference.'"

Id. at 236, 103 S.Ct. at 2331 (quoting Spinelli v. United States, 393 U.S. 410, 419, 89 S.Ct. 584, 590, 21 L.Ed.2d 637 (1969)). This Court's function is simply to ensure that he had a substantial basis for finding probable cause. Id. at 238-39, 103 S.Ct. at 2332 (citation omitted).

Clark/Frazier Residence

The warrant to search the Clark/Frazier residence was supported by probable cause. Ms. Clark's identity was disclosed, together with her reason for coming forward. Thus, it was clear that she was a citizen informant, not a paid criminal informer. United States v. Michaelian, 803 F.2d 1042, 1045-46 (9th Cir. 1986) (corroboration of citizen informant unnecessary to determination of probable cause). Furthermore, she provided a detailed description of a plan to grow marijuana in her basement. In doing so, she recounted specific steps

which the conspirators had taken which were consistent with the scheme she described. Finally, she explained that she had discovered approximately two pounds of marijuana in a cooler with "D. Frazier" written on the lid. When she inquired of Mr. Frazier, she was informed that John Newsom had given it to him to sell. At the time she went to the police, it was still in her closet.

Newsom and Naplin Residences

When law enforcement officers executed the first warrant, they found the contraband and evidence which Ms. Clark had described in the locations in which she said it would be. As a result, the issuing judge was provided with substantial corroboration of both her veracity and reliability. That fact is not sufficient to establish probable cause, however, The Court must still determine whether the evidence presented

by Agent Bauman was sufficient to create a nexus between the scheme which Ms. Clark described and the Newsom and Naplin residences. See United States v. Ramos, 923 F.2d 1346, 1351 (9th Cir. 1991).

In United States v. Ayers, 924 F.2d 1468 (9th Cir. 1991), the Ninth Circuit considered the question of probable cause in an analogous context. There, the police obtained a warrant to search the defendant's residence. The affidavit upon which the warrant was based "alleged that a 'confidential reliable informant' had personally observed [the defendant] selling cocaine from his automobile in North Richmond [California]." Id. at 1477. The affidavit indicated that the informant had given a description of [the defendant] and his automobile, and the place where the defendant lived. Id. at 1477. Finally, the affidavit recited that an officer confirmed the defendant's

residence by means of traffic citations, his driver's license, and utility records. Id. at 1477-78.

The defendant denied that the information set forth in the affidavit established a nexus between his alleged drug transactions in North Richmond and his residence. The Circuit disagreed, noting that a judge "'is entitled to draw reasonable inferences about where evidence is likely to be kept, based upon the nature of the evidence and the type of offense.'" Id. at 1479 (quoting United States v. Angulo-Lopez, 791 F.2d 1394, 1399 (9th Cir. 1986)).

Angulo-Lopez is equally illustrative. As in Ayers, one of the issues was whether a nexus existed between alleged drug dealing and the place searched. To resolve that issue, the Circuit reviewed the affidavit, which recited the following facts:

The defendant's sister and brother-in-law admitted selling heroin. During the period in which the admissions were made, the defendant was seen at their residence, and his brother-in-law said he was living there. United States v. Angulo-Lopez, 791 F.2d 1394. 1396 (9th Cir. 1986).

In addition, the defendant's brother-in-law told an informant that he could sell the informant heroin, and in fact did so. Id. at 1396.

Furthermore, the defendant was observed in various shopping center parking lots exchanging items with unidentified individuals. During the several-week period in which these exchanges occurred, the defendant's sister told informants that her husband and brother were selling heroin.

Finally, two citizen-informants told the police that the defendant was selling

heroin from his residence. Id. at 396.

The Circuit found the facts set forth in the affidavit sufficient to create probable cause. In doing so, it observed that, "In the case of drug dealers, evidence is likely to be found where the dealers live. . . . When the traffickers consist of a ringleader and assistants, a fair probability exists that drugs will be present at the assistant's residence as well as the ringleader's." Angulo-Lopez, 791 F.2d at 1399 (citations omitted).

Here, the issuing judge was informed that John Newsom had given Dennis Frazier approximately two pounds of marijuana to sell. From the fact, the judge could have inferred that Mr. Newsom was a drug dealer; that he possessed more than minimal quantities of marijuana; and that he arranged to have others sell marijuana which he procured.

The judge was also advised that Mr.

Newsom offered to pay seven thousand dollars to have Dennis Frazier and Barbara Clark grow marijuana. From that, the judge could have inferred that Mr. Newsom was the ringleader. Because of Mr. Newsom's role, it would have been reasonable to infer that he maintained information about all facets of the operation at his residence.

The judge was told that Messrs. Frazier and Newsom delivered equipment for growing marijuana to Ms. Clark's residence. Obviously, the equipment had to come from somewhere. The judge could have inferred that it had been stored at the residence of either the ringleader or the other assistant.

The judge was informed that the marijuana plants which were to be grown in the Clark/Frazier residence were in existence at that time. From that, he could have inferred that the plants were

at either the ringleader's residence, or that of the other assistant.

Finally, the judge was advised that Wayne Naplin and John Newsom were to receive the plants after harvest. From that, he could have inferred that Mr. Newsom's method of operation was to move marijuana plants from place to place, paying others to complete various phases of the operation. If Mr. Newsom had already begun to move equipment to Ms. Clark's house in anticipation of the operation he intended to conduct there, it was reasonable to assume that he had begun to make preparations at Wayne Naplin's place. Thus, there was a "fair probability" that evidence of the conspiracy was then present on those premises.

It is well established that "[f]or probable cause to exist, a [judge] need not determine that the evidence sought is

in fact on the premises to be searched, . . . or that the evidence is more likely than not to be found where the search takes place." United States v. Peacock, 761 F.2d 1313, 1315 (9th Cir. 1985) (citations omitted), cert. denied, 474 U.S. 847, 106 S.Ct. 139, 88 L.Ed.2d 114 (1985). It is necessary only that "the facts be sufficient to justify a conclusion that the property which is the object of the search is probably on the premises to be searched at the time the warrant is issued." United States v. Greany, 929 F.2d 523, 524-25 (9th Cir. 1991) (citations omitted). Measured by that standard, the issuing judge had a substantial basis for finding probable cause.

PARTICULARITY OF WARRANTS

The defendants next contend that the Newsom and Naplin warrants were overbroad, thereby violating the Fourth Amendment's

injunction that no warrant may issue "but upon probable cause, . . . particularly describing the place to be searched, and the persons or things to be seized. To determine whether the defendants' contention is correct, the Court must consider two interrelated rules. "First, a warrant must describe the . . . things to be seized with sufficient particularity, taking account of 'the circumstances of the case and the types of items involved.' United States v. Spilotro, 800 F.2d 959, 963 (9th Cir. 1986). Second, it must be no broader than the probable cause on which it is based." United States v. Weber, 915 F.2d 1282, 1285 (9th Cir.1990) (citation omitted), amended, 923 F.2d 1338 (9th Cir.1990).

It is true that the Newsom and Naplin warrants authorized law enforcement officers to search for a wide variety of property. (Transcript of Telephonic

Search Warrants, at 5-6.) However, the defendants have yet to demonstrate that any of the items which were actually seized were beyond the scope of probable cause. Thus, even if the list of property was overbroad, there is no reason to suppress property for which officers had probable cause to search. United States v. Gomez-Soto, 723 F.2d 649, 654 (9th Cir. 1984), cert. denied, 466 U.S. 977, 104 S.Ct. 2360, 80 L.Ed.2d 831 (1984).

The record reflects that most (if not all) of the marijuana plants which are the subject of the indictment were found in an outbuilding at the Naplin place. Because there was probable cause to believe that contraband and evidence were on the premises, law enforcement officers were entitled to search the outbuildings as well as the residence. Miller, 753 F.2d at 1481; United States v. Roberts, 747 F.2d 537, 545 (9th Cir. 1983), cert.

denied, 465 U.S. 1100, 104 S.Ct. 1593, 80 L.Ed.2d 125 (1984).

IT IS HEREBY ORDERED:

The defendant's motion to suppress (ct. Rec. 15) is **denied.**

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and furnish copies to counsel.

DATED this 9TH day of June, 1992.

(handwritten signature)
FRED VAN SICKLE
United States District Judge

APPENDIX D

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
JUNE 22, 1992
JAMES R. LARSEN, CLERK
_____, DEPUTY

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, vs. WAYNE R. NAPLIN, Defendant.	NO. CR-92-100-FVS SUPPLEMENTAL ORDER DENYING MOTIONS TO SUPPRESS AND FOR HEARING ON CO-CONSPIRATOR STATEMENTS

THIS MATTER came before the Court on June 10, 1992, for an evidentiary hearing. The defendant was present, together with his attorney, Bevan Maxey. The government was represented by Assistant United States Attorney Timothy J. Ohms.

On June 11, 1992, the Court announced its rulings on the pending motions by

telephone conference call. This order is intended to memorialize the Court's Various decisions.

A. MOTION TO SUPPRESS

1. Findings[1]

At about 5:30 p.m. on January 11, 1992, Agent Bauman re-contacted Judge Edwards by telephone. Judge Edwards placed Agent Bauman under oath, and had him read the affidavit. After Agent Bauman under oath, and had him read the affidavit. After listening to Agent Bauman's recitation, Judge Edwards said, "Probable cause, no doubt[.] [G]o ahead and fill out the warrant in accordance with the instructions that I gave you . . . earlier today . . . same process." (Transcript of Telephonic Search Warrants, at 10.)

---

[1]The background to these findings is set forth in the Order Denying Motion to Supress.

Judge Edwards was referring to the instructions which he had given while issuing a warrant for the Clark/Frazier residence. In approving the Clark/Frazier warrant, Judge Edwards had said, "I think that's quite an extensive[,] and certainly sufficient[,] affidavit to establish your probable cause. Have you filled out a . . . warrant then with the same description of the property -- and premises?" (Transcript of Telephonic Search Warrants, at 4.) Judge Edwards then went on to say (during the 11:00 a.m. call), "[T]here's a place for my signature, and you'll print it on the warrant -- you'll print my name there, and then there's a place where you are to put your name and title as being the one authorized . . . ."

By directing Agent-Bauman (during the 5:30 p.m. call) to "fill out the warrant in accordance with the instructions that I gave you . . . earlier today," Judge

Edwards authorized him to prepare a warrant which included the "same description of the property . . . and premises" which Agent Bauman recited in the affidavit. Thus, during the 5:30 p.m. call, Judge Edwards approved a warrant authorizing law enforcement officers to search the Newsom residence and "all outbuildings, sheds, [or] garages." (Transcript of Telephonic Search Warrants, at 6.) In conducting the search, officers were entitled to seize, among other things, "Growing marijuana[,] drying marijuana and marijuana in any other form, growing equipment including drying racks, hoses, pipes, fertilizer, potting soil and the like, also papers, including books, records, ledgers, indicating transactions, records of the growing operation, finances and identification of ownership or possession." (Transcript of Telephonic Warrants, at 6.)

Agent Bauman then requested a second warrant; one for the Naplin residence. Judge Edwards indicated that he understood that the "second affidavit is virtually the same with basically a name change and a description of the premises change." (Transcript of Telephonic Search Warrants, at 10-11.) Judge Edwards had Agent Bauman describe the second place to be searched. The following exchange then occurred:

> DE: All right, based on that . . . I'll go ahead and authorized the second warrant as well.
>
> FB: Ok.
>
> DE: Uh, for Wayne Naplin's house. Ok?
>
> FB: Yeah.

(Transcript of Telephonic Search Warrants, at 11.)

The reference to Wayne Naplin's house was meant to clarify that the second warrant authorized a search of the Naplin/Lien residence, as opposed to the Newsom residence. Judge Edward's comment

was not intended to limit the ccope of the search.

Agent Bauman was in Okanogan when he made the 5:30 p.m. call to Judge Edwards. By 6:30 p.m., the warrants had been issued and Agent Bauman was on his way to Oroville, a trip which takes approximately one hour.

Between 6:00 and 8:00 p.m., the law enforcement officers who were to participate in the searches assembled at the Oroville police station. The officers were briefed and divided into two teams. At least some of the officers present at the briefing examined the search warrants.

A Sergeant Gahimer was assigned to the team which was to search the Naplin residence. He had a search warrant, which he served when the team arrived. The premises were not searched prior to the time the warrant was served.

The Naplin place is located in a

remote area of Okanogan County, and it was dark when the officers arrived. The search leaders had reason to believe that a multi-person conspiracy existed. They did not know who would be present on the premises when they arrived, however, or whether any of the alleged co-conspirators had learned of the search at the Clark/Frazier residence earlier that day.

Upon arriving at the Naplin residence, officers conducted a protective sweep of all buildings on the premises. During the sweep, a reserve deputy sheriff entered an outbuilding located about one hundred feet from the residence. Inside, he discovered a marijuana growing operation. Word of the discovery was communicated by radio to Detective Robert Tyrrell, who was in the Naplin residence. He, in turn, contacted Agent Bauman.

The officers had been instructed by an Okanogan County deputy prosecuting

attorney to suspend the search if they discovered contraband, and to contact the issuing judge. (The instructions were issued due to an abundance of caution, not because the deputy prosecutor questioned the scope of the warrant.) As a result, the search at the Naplin residence was halted.

In the meantime, a search team led by Agent Bauman had gone to the Newsom residence. Upon arrival, Agent Bauman walked around the outside of the house looking for an unsecured means of access. He discovered a lean-to behind the house. Inside, he observed what he believed were "grow" lights.

Because of the discoveries, Agent Bauman attempted to call Judge Edwards, but was unable to reach him until approximately 11:30 p.m. When Agent Bauman finally made contact, he indicated that he wanted to supplement the information

previously provided. (Amendments to Telephonic Search. Warrants, at 1.) Judge Edwards listened to the supplemental information, and then made the following comments:

> DE: [B]ased on that additional information[,] I'll expand the -- the scope of the warrant on both . . .
>
> FB: OK.
>
> DE: . . . Newsom and Naplin . . . .

(Amendments to Telephonic Search Warrants, at 3.)

In making those comments, Judge Edwards intended to confirm the authority which he had already conferred by issuing the warrants. He did so to remove any question which the officers may have had regarding the proper scope of the search.

2. Conclusions

(a) No search occurred at either the Newsom premises or the Naplin/Lien premises on January 11, 1992, prior to the issuance of search warrants.

(b) The warrants issued by Judge Edwards during the 5:30 p.m. telephone conference authorized law enforcement officers to search all of the buildings on both the Newsom and Naplin premises. Thus, the reserve deputy's discovery of marijuana plants in an outbuilding on the Naplin premises during the protective sweep at the beginning of the search was within the scope of the Naplin warrant.

(c) Even if Judge Edwards' comments are now construed to limit the scope of the Naplin search to the residence, the seizure of the marijuana plants located in the out building was nevertheless justified for either of two reasons:

(i) The fact that Agent Bauman may have misunderstood Judge Edwards' instructions does not necessarily invalidate the subsequent search. The issue is not whether Agent Bauman's interpretation of the conversation was

correct, but whether it was reasonable. See Illinois v. Rodriguez, 497 U.S. 177, ___ 110 S.Ct. 2793, 2800, 111 L.Ed.2d 148 (1990). Where, as here, probable cause did exist for a search of the building in which the plants were observed, an error of interpretation may be excused if it "was objectively understandable and reasonable." Maryland v. Garrison, 480 U.S. 79, 88, 107 S.Ct. 1013, 1019, 94 L.Ed.2d 72 (1987).

In considering that question, it must be remembered that during the 5:30 p.m. call, Judge Edwards stated unequivocally that Agent Bauman had established probable cause. He then issued a warrant for the Newsom residence which authorized a search of the entire premises. After doing so, he turned to Agent Bauman's request for a warrant for the Naplin/Lien premises. In addressing that request, Judge Edwards indicated that he understood that the

"second affidavit is virtually the same with basically a name change and a description of the premises change." (Transcript of Telephonic Search Warrants, at 10-11.) Given what Judge Edwards said, it was not unreasonable for Agent Bauman to conclude that the judge had approved a search of the Naplin premises whose scope was no different than that set forth in the Newsom warrant.

(ii) In the alternative, the seizure of the marijuana plants meets the requirements of the "plain view" exception. First, the reserve deputy who made the discovery had a right to be in the building in which the plants were sighted. Second, the incriminating character of the plants was immediately apparent. See Horton v. California, 496 U.S. 128, 136-37, 110 S.Ct. 2301, 2308, 110 L.Ed.2d 112 (1990).

Of the two elements, only the first

is in dispute. The defendants deny that the "protective sweep" which led to the sighting was proper. To justify such an entry, "there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." Maryland v. Buie, 494 U.S. 325, 334, 110 S.Ct. 1093, 1099-1100, 108 L.Ed.2d 276 (1990).

Here, the record reflects that it was dark when the officers arrived at the Naplin residence, which is located in a remote area in Okanogan County. Although the officers had reason to believe a multi-person conspiracy existed, they did not know whether all of the conspirators had been accounted for, and whether any of the conspirators had learned of the Clark/Frazier search.

Furthermore, the officers could have inferred that any unapprehended conspirator had access to all of the buildings on the premises. Since the building in which the marijuana plants were growing was approximately one hundred feet from the residence, a person hiding in it may well have been able to watch the officers' movements without being detected.

Under such circumstances, the officers were confronted with an objective threat to their safety when they arrived at the Naplin place to execute the search warrant. A protective sweep was an appropriate means to reduce the risk.

(e) The Naplin warrant was the second one to be issued during the 5:30 p.m. telephone call. In doing so, Judge Edwards was not required to have Agent Bauman re-read the affidavit upon which probable cause was based.

B. CO-CONSPIRATOR STATEMENTS

Fed. R. Evid. 801(d)(2)(E) provides that "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy" is not hearsay. To demonstrate the applicability of the rule, the government must prove (by a preponderance of the evidence) that: (a) a conspiracy existed which involved the declarant and the defendant; (b) the declaration was made in furtherance of the conspiracy; and (c) the declaration was made during the course of the conspiracy. See Bourjaily v. United States, 483 U.S. 171, 180-181, 107 S.Ct. 2775, 2781, 97 L.Ed.2d 144 (1987). Here, there is some indication that the government will call Barbara Clark as a witness to testify regarding statements which Dennis Frazier (one of the co-defendants) made to her regarding the scheme to grow marijuana. The Court will not rule upon the

applicability of Rule 801(d)(2)(E), however, until such time as the parties identify the statements actually at issue and the reasons for their admission (or exclusion).

IT IS HEREBY ORDERED:

1. The motion to suppress is denied. Provided, since neither party offered evidence regarding the circumstances of Ms. Lien's arrest and the subsequent search of her purse, the Court will reserve ruling on the constitutionality of that search until such time as the fruits thereof are offered at trial.

2. The request for a pre-trial hearing to determine the admissibility of co-conspirator statements is denied.

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and furnish copies to counsel.

DATED this 19th day of June 1992.

(handwritten signature)
FRED VAN SICKLE
United States District Judge

APPENDIX E

Filed
92 JAN 13 AM 9:43
OKANOGAN DIST. COURT

DISTRICT COURT, STATE OF WASHINGTON

IN AND FOR THE COUNTY OF OKANOGAN

* * * * * * * * * * * * * * * * * * *

STATE OF WASHINGTON) NO._____
: ss.
County of Okanogan) AFFIDAVIT FOR SEARCH WARRANT

ALVIN F. BAUMAN, being first duly sworn on oath, deposes and says:

1. That your affiant believes that:

(x) Evidence of a crime (describe):

Possession with Intent to Deliver marijuana and Conspiracy to Manufacture Marijuana and Involving Minors in Manufacture of Marijuana.

(X) Contraband, the fruits of a crime, or things otherwise criminally possessed (consisting of):

A. BOOKS, RECORDS, RECEIPTS, NOTES, LEDGERS AND OTHER PAPERS RELATING TO POSSESSING AND TRAFFICKING IN ~~COCAINE.~~ MARIJUANA

B. ADDRESS AND/OR TELEPHONE BOOKS AND PAPERS LISTING NAMES, ADDRESSES AND/OR TELEPHONE NUMBERS OF ANY PERSONS WHO MAY BE INVOLVED IN ILLEGAL POSSESSION & AND TRAFFICKING OF ~~COCAINE~~. MARIJUANA

C. BOOKS, RECORDS, RECEIPTS, BANK STATEMENTS AND RECORDS, MONEY DRAFTS, LETTERS OF CREDIT, MONEY ORDER AND CASHIER CHECKS RECEIPTS, PASSBOOKS, BANK CHECKS, AND ASSETS AND THE OBTAINING, SECRETING, TRANSFER, CONCEALMENT AND/OR EXPENDITURE OF MONEY, SAFE DEPOSIT BOX RECORDS AND/OR KEYS.

D. UNITED STATES CURRENCY, PRECIOUS METALS, JEWELRY AND FINANCIAL INSTRUMENTS, INCLUDING, BUT NOT LIMITED TO STOCKS AND BONDS, REAL ESTATE DEEDS OF TRUST AND REAL ESTATE DEEDS.

E. PHOTOGRAPHS, IN PARTICULAR, PHOTOGRAPHS OF CO-CONSPIRATORS AND ASSETS AND/OR OF COCAINE.

F. INDICIA OF OCCUPANCY RESIDENCY AND/OR OWNERSHIP OF THE PREMISES DESCRIBED HEREIN, INCLUDING, BUT NOT LIMITED TO, UTILITY AND TELEPHONE BILLS, CANCELED ENVELOPES AND KEYS.

G. LUXURY ITEMS INCLUDING, BUT NOT LIMITED TO, ELECTRONIC EQUIPMENT SUCH AS, STEREOS, T.V.'S, VCR'S AND MOTOR VEHICLES.

H. ANY AND ALL OTHER MATERIAL EVIDENCE OF VIOLATIONS OF RCW 69.50.401, TO INCLUDE BUT NOT LIMITED TO DRUG PARAPHERNALIA FOR PACKAGING, WEIGHING, DISTRIBUTING, AND USING MARIJUANA AND OTHER NARCOTICS SUCH AS SCALES, BAGGIES, GRINDERS, SNIFFERS, HYPODERMIC NEEDLES AND SYRINGES AND SMOKING DEVICES.

I. Growing marijuana, drying marijuana and marijuana in any other form; growing equipment, including drying racks, hoses, pipes, fertilizer, potting soil and

the like. Also, papers including books, records and ledgers indicating transactions, records of the growing operation, finances and identification of ownership or possession.

( ) Weapons or things by means of which a crime has been committed or reasonably appears about to be committed (describe):

are concealed in Okanogan County, Washington in, on or about:

(X) Certain premises (describe):

A grey one story house with a metal roof and a basement located at 403 Main Street, Oroville, Washington. It has a chain link fence around the yard, a garage. This house is rented by Barbara D. Clark from Arthur Keeney, including all the curtilage of said premises and all outbuildings, sheds, garages and any other buildings on the curtilage of the premises, attached or unattached.

( ) Vehicles (describe):
(X) Person(s) (describe)

Dennis Frazier a white male, date of birth 03-24-55.

2. Basis for reliability:

(X) Your affiant (see below)

Alvin F. Bauman, U.S. Border Patrol. I am an agent for the U.S. Border Patrol and so commissioned on January 20, 1985. I am currently assigned to the North Central Washington narcotics Task Force and have been a member of the Task Force since

December 19, 1988 as a special deputy.

I attended the U.S. Border Patrol Academy and graduated in May, 1985. I am cross-trained with DEA and Customs specifically for narcotics investigations. I have carried DEA authority since 1986 and Customs authority also since 1986.

I have extensive training in the identification of marijuana in all forms as well as equipment used in the growing and packaging of marijuana.

I have executed approximately one hundred search warrants for narcotics violations including manufacture of marijuana virtually all of which have resulted in the confiscation of narcotics and/or the arrest of suspects involved in narcotics violations, several of these involving marijuana grow operations.

(X) Other persons providing information (see below)

Barbara D. Clark, date of birth 10-07-58, a white female.

(X) Method of gaining information (see below)

3. That your affiant's belief is based upon the following facts and circumstances:

On 01-11-92 I received a telephone call from the Oroville Police Department advising me that Barbara D. Clark was in the Oroville Police Department at that time. I went to the Police Station and met with Barbara Clark who advised me that her boyfriend, Dennis Frazier had been beating her and Barbara's oldest son, Taylor.

Barbara advised me that she and Dennis have been living together for approximately ten years and that she and Dennis have two children together. She and Dennis Frazier both live in the residence, described above, however, the house is rented in Barbara's name. Barbara admitted to me that she has used cocaine and marijuana in the past and that she has used both drugs in the presence of John Newsom and Dennis Frazier. She is not using any drugs at this time and has not used any drugs for some time. She also advised me that Dennis Frazier had been involved heavily in drug use and dealing lately mostly cocaine and marijuana. Barbara also advised me that Dennis Frazier, John Newsom, and Wayne Naplin were getting ready to begin a marijuana grow in the basement of Barbara's house.

On 01-09-92, Barbara Clark was told by Dennis Frazier that he was going to use his pickup to haul/marijuana growing equipment to the house. After Dennis Frazier discovered his pickup was broken down, he went to Oroville High School and got John Newsom's pickup from Newsom's wife, Pam Newsom. Dennis then picked up John Newsom and they in turn picked up the marijuana growing equipment and carried it into Barbara Clark's house.

Included in the equipment were several large tables, which were placed in the garage; some large boxes that were carried into the house, and some building material, including sheet rock and lumber for building a divider wall in the basement to facilitate the grow. John Newsom told Dennis Frazier and Barbara Clark that he would pay them $7,000 to grow the marijuana and that he would pay

all the utility bills. Dennis Frazier told Barbara Clark that Wayne Naplin was also a partner in the marijuana grow operation and that Wayne Naplin and John Newsom are to receive the marijuana plants when they are harvested. Dennis Frazier additionally told Barbara Clark that the marijuana plants were already in existence and that it would be about one month before the marijuana plants could be transported to the house. Newsom advised Barbara Clark that Newsom was waiting for the marijuana plants to begin budding before they could be brought to the house. Dennis Frazier is to use this time period to prepare the basement grow room for the marijuana plants.

Based upon affiant's training and experience, it is the bud of the marijuana plant that is the most valuable part, selling for approximately $2400 per pound. Further, it is the female marijuana plant that buds and the male plants hold so little value that they are often destroyed at the point that the female plants can be distinguished from the male plants. The only way to distinguish the two is to wait for the females to begin budding.

Barbara Clark advised affiant that approximately one week ago, she had seen a red and white cooler in her closet with "D. Frazier" written on the lid. When Barbara looked inside the cooler, she discovered approximately two pounds of marijuana. When she asked Dennis Frazier about the marijuana, Dennis told her that John Newsom had given it to him to sell. As of this date, 01-11-92, Barbara told affiant the cooler full of marijuana was still in her closet.

Barbara Clark has already signed a consent to search the house at 403 Main Street in Oroville, Washington.

4. Summary of additional evidence (if applicable):

Barbara Clark advised affiant that Dennis Frazier's use and selling of drugs has increased in the last few years and with this he has become more violent, therefore, she is concerned about the welfare of herself and her children. Barbara advised affiant that she decided to confide in the police concerning the violence and Dennis' involvement in narcotics.

A check of computerized criminal history records reveals that Barbara Clark, on 04-26-85, was arrested on a warrant for "Sale and Del Cont Sub". This charge was dismissed on 07-19-85 due to insufficient evidence.

(handwritten signature)
ALVIN F. BAUMAN
NCW NARCOTICS TASK FORCE

Approved:

(handwritten signature)
JOE SOLSENG
Deputy Prosecuting Attorney

Sworn and subscribed on:

Date: 01-11-92 (handwritten)

Time: 1225 (handwritten)

(David Edwards) handwritten
JUDGE/COURT COMMISSIONER

APPENDIX F

FILED
92 JAN 13 AM 9:43
OKANOGAN COUNTY DIST. COURT

DISTRICT COURT, STATE OF WASHINGTON

IN AND FOR THE COUNTY OF OKANOGAN

* * * * * * * * * * * * * * * * * * * *

STATE OF WASHINGTON) NO. _____
: ss
County of Okanogan) AFFIDAVIT FOR SEARCH WARRANT

ALVIN F. BAUMAN, being first duly sworn on oath,

1. That your affiant believes that:

(X) Evidence of a crime (describe):

Possession with Intent to Deliver Marijuana and Conspiracy to Manufacture Marijuana and Involving Minors in Manufacture of Marijuana.

(X) Contraband, the fruits of a crime, or things otherwise criminally possessed (consisting of):

A. BOOKS, RECORDS, RECEIPTS, NOTES, LEDGERS AND OTHER PAPERS RELATING TO POSSESSION AND TRAFFICKING IN MARIJUANA.

B. ADDRESS AND/OR TELEPHONE BOOKS AND PAPERS LISTING NAMES, ADDRESSES AND/OR TELEPHONE NUMBERS OF ANY PERSONS WHO MAY BE INVOLVED IN ILLEGAL POSSESSING AND TRAFFICKING OF ~~COCAINE~~ MARIJUANA.

C. BOOKS, RECORDS, RECEIPTS, BANK STATEMENTS AND RECORDS, MONEY DRAFTS, LETTERS OF CREDIT, MONEY ORDER AND CASHIER CHECKS RECEIPTS, PASSBOOKS, BANK CHECKS AND ASSETS AND THE OBTAINING, SECRETING, TRANSFER, CONCEALMENT AND/OR EXPENDITURE OF MONEY, SAFE DEPOSIT BOX RECORDS AND/OR KEYS.

D. UNITED STATES CURRENCY, PRECIOUS METALS, JEWELRY AND FINANCIAL INSTRUMENTS, INCLUDING, BUT NOT LIMITED TO STOCKS AND BONDS, REAL ESTATE DEEDS OF TRUST AND REAL ESTATE DEEDS.

E. PHOTOGRAPHS, IN PARTICULAR, PHOTOGRAPHS OF CO-CONSPIRATORS AND ASSETS AND/OR COCAINE.

F. INDICIA OF OCCUPANCY, RESIDENCY, AND/OR OWNERSHIP OF THE PREMISES DESCRIBED HEREIN, INCLUDING, BUT NOT LIMITED TO, UTILITY AND TELEPHONE BILLS, CANCELED ENVELOPES AND KEYS.

G. LUXURY ITEMS INCLUDING, BUT NOT LIMITED TO, ELECTRONIC EQUIPMENT SUCH AS, STEREOS, T.V.'S, VCR'S AND MOTOR VEHICLES.

H. ANY AND ALL OTHER MATERIAL EVIDENCE OF VIOLATIONS OF RCW 60.50.401, TO INCLUDE BUT NOT LIMITED TO DRUG PARAPHERNALIA FOR PACKAGING WEIGHING, DISTRIBUTING, AND USING MARIJUANA AND OTHER NARCOTICS SUCH AS SCALES, BAGGIES, GRINDERS, SNIFFERS, HYPODERMIC NEEDLES AND SYRINGES AND SMOKING DEVICES.

I. Growing marijuana, drying marijuana and marijuana in any other form; growing equipment, including drying racks, hoses, pipes, fertilizer, potting soil and

the like. Also, papers including books, records and ledgers indicating transactions, records of the growing operation, finances and identification of ownership or possession.

( ) Weapons or things by means of which a crime has been committed or reasonably appears about to be committed (describe):

are concealed in Okanogan County, Washington in, on or about:

(X) Certain premises (describe):

The residence at Star Route, Box 20-1, Oroville, Washington. The residence is a frame house with a high pole gate over the entrance. It also has a rail fence in front of the house, including all the curtilage of said premises and all outbuildings, sheds, garages and any other buildings on the curtilage of the premises, attached or unattached. The residence sits approximately three miles west from the Molson turnoff. John Newsom's driver's license lists Star Route, Box 20-1, Oroville, Washington as his address. Affiant is familiar with John Newsom, his vehicles, and his residence and will participate in the serving of the search warrant.

( ) Vehicles (describe):

(X) Person(s) (describe):

John M. Newsom, born 005-10-53, is 6'1" and weighs 210 pounds with brown eyes.

2. Basis for reliability:

(X) Your affiant (see below)

Alvin R. Bauman, U.S. Border Patrol. I am an agent for the U.S. Border Patrol and so commissioned on January 20, 1985. I am currently assigned to the North Central Washington Narcotics Task Force and have been a member of the Task Force since December 19, 1988 as a special deputy.

I attended the U.S. Border Patrol Academy and graduated in May, 1985. I am cross-trained with DEA and Customs specifically for narcotics investigations. I have carried DEA authority since 1986 and Customs authority also since 1986.

I have extensive training in the identification of marijuana in all forms as well as equipment used in the growing and packaging of marijuana.

I have executed approximately one hundred search warrants for narcotics violations including manufacture of marijuana virtually all of which have resulted in the confiscation of narcotics and/or the arrest of suspects involved in narcotics and marijuana violations, several of these involving marijuana grow operations.

Affiant has interviewed hundreds of narcotics and marijuana suspects who have revealed to me:

1) Traffickers in controlled substances try to conduct their business in a secretive manner so as to avoid detection by law enforcement and to protect themselves from theft and robbery by other narcotics and marijuana suspects. 2) Narcotics and marijuana suspects frequently are armed with firearms and other weapons in order to protect themselves and their product. 3) Traffickers of controlled substances try to hide their earnings gained from narcotics and marijuana trafficking and

legitimate investments, such as real estate, bank accounts, stocks, precious metals and jewelry. They also keep money and narcotics and marijuana in safe deposit boxes. 4) Traffickers of controlled substances keep books and records of their transactions, so they know the amounts other people owe them and how much they owe other people. They also keep phone numbers of co-conspirators so that they can conduct business over the phone or arrange meetings 5) Narcotics dealers are also fond of making photographs of themselves and co-conspirators in possession of narcotics and marijuana and large amounts of money. 6) Marijuana growers frequently keep records on their marijuana grows covering information such as when the seeds were planted, when the seeds were fertilized, when the first buds appeared, and when they will be ready for harvesting. These records often include financial information such as the expected cost of the grow, expected proceeds, and expected profit.

(X) Other persons providing information (see below)

Barbara D. Clark, date of birth 10-07-58, a white female.

(X) Method of gaining information (see below)

3. That your affiant's belief is based upon the following facts and circumstances:

On 01-11-92 I received a telephone call from the Oroville Police Department advising me that Barbara D. Clark was in

the Oroville Police Department at that time. I went to the Police Station and met with Barbara Clark who advised me that her boyfriend, Dennis Frazier had been beating her and Barbara's oldest son, Taylor.

Barbara advised me that she and Dennis have been living together for approximately ten years and that she and Dennis have two children together. She and Dennis Frazier both live in the residence, described above, however, the house is rented in Barbara's name. Barbara admitted to me that she has used cocaine and marijuana in the past and that she has used both drugs in the presence of John Newsom and Dennis Frazier. She is not using any drugs at this time and has not used any drugs for some time. She also advised me that Dennis Frazier had been involved heavily in drug use and dealing lately mostly cocaine and marijuana. Barbara also advised me that Dennis Frazier, John Newsom, and Wayne Naplin were getting ready to begin a marijuana grow in the basement of Barbara's house.

On 01-09-92, Barbara Clark was told by Dennis Frazier that he was going to use his pickup to haul marijuana growing equipment to the house. After Dennis Frazier discovered his pickup was broken down, he went to Oroville High School and got John Newsom's pickup from Newsom's wife, Pam Newsom. Dennis then picked up John Newsom and they in turn picked up the marijuana growing equipment and carried it into Barbara Clark's house. Included in the equipment were several large tables, which were placed in the garage; some large boxes that were carried into the house, and some building material, including sheetrock and lumber for

building a divider wall in the basement to facilitate the grow. John Newsom told Dennis Frazier and Barbara Clark that he would pay them $7,000 to grow the marijuana and that he would pay all the utility bills. Dennis Frazier told Barbara Clark that Wayne Naplin was also a partner in the marijuana grow operation and that Wayne Naplin and John Newsom are to receive the marijuana plants when they are harvested. Dennis Frazier additionally told Barbara Clark that the marijuana plants were already in existence and that it would be about one month before the marijuana plants could be transported to the house. Newsom advised Barbara Clark that Newsom was waiting for the marijuana plants to begin budding before they could be brought to the house. Dennis Frazier is to use this time period to prepare the basement grow room for the marijuana plants.

Based upon affiant's training and experience, it is the bud of the marijuana plant that is the most valuable part, selling for approximately $2400 per pound. Further, it is the female marijuana plant that buds and the male plants hold so little value that the~ are often destroyed at the point that the female plants can be distinguished from the male plants. The only way to distinguish the two is to wait for the females to begin budding.

Barbara Clark advised affiant that approximately one week ago, she had seen a red and white cooler in her closet with "D. Frazier" written on the lid. When Barbara looked inside the cooler, she discovered approximately two pounds of marijuana. When she asked Dennis Frazier about the marijuana, Dennis told her that

John Newsom had given it to him to sell. As of this date, 01-11-92, Barbara told affiant the cooler full of marijuana was still in her closet.

Barbara Clark has already signed a consent to search the house at 403 Main Street in Oroville, Washington.

Barbara Clark advised affiant that Dennis Frazier's use and selling of drugs has increased in the last few years and with this he has become more violent, therefore, she is concerned about the welfare of herself and her children. Barbara advised affiant that she decided to confide in the police concerning the violence and Dennis' involvement in narcotics.

A check of computerized criminal history records reveals that Barbara Clark, on 004-26-85 was arrested on a warrant for "Sale and Del Cont Sub". This charge was dismissed on 07-19-85 due to insufficient evidence.

Affiant served a search warrant on the suspect, Dennis Frazier, this date, at 403 Main Street, Oroville, Washington. Detective Robert Tyrrell remained with the suspect while affiant went to the master bedroom closet. There affiant found a red and white cooler, with "D. Frazier" written on the lid. Affiant opened the cooler and found it contained approximately two pounds of marijuana. Affiant then returned to the suspect and told the suspect that he was under arrest. Detective Robert Tyrrell read the suspect his rights and Tyrrell and I waited for another officer to arrive. Oroville Police Sergeant Jan Lewis arrived and remained

with the suspect while Detective Tyrrell and I further searched the premises.

We found a smaller amount of marijuana in a chest of drawers in the master bedroom; a small amount of marijuana in the living room with a marijuana water pipe. We then went to the basement where we found fifteen to twenty approximately ten foot long plastic trays. These trays had sets of holes drilled in them approximately every two inches. These trays appeared to be plastic rain gutters which had been modified for the purpose of growing marijuana. Barbara Clark advised affiant that the marijuana grow planned for 403 Main Street, Oroville, Washington was to be hydroponic grow. In affiant's experience trays such as those described above would work well in a hydroponic marijuana grow as they allow free circulation of water. Also found were several four foot long stakes with numerous nails pounded into them approximately every six inches all the way through the stakes. In affiant's experience these stakes could be used to support marijuana plants as they grow. These trays and stakes were found in large cardboard boxes as previously described by Barbara Clark. Additionally affiant located the aforementioned sheet rock, lumber and tables as also described by Barbara Clark.

Dennis Frazier was arrested and after being Mirandized, advised affiant that he knows both John Newsom and Wayne Naplin, but was unwilling to talk further of their involvement.

Since all the information provided by Barbara Clark was corroborated, it is

affiant's belief that there is sufficient probable cause to arrest John Newsom and Wayne Naplin for Conspiracy to Manufacture Marijuana and Conspiracy to Involve a Minor in the Manufacture of Marijuana. Barbara Clark advised that both John Newsom and Wayne Naplin are well aware of her three minor children living with her and Dennis Frazier at 403 Main Street, Oroville, Washington.

Additionally, Barbara Clark's eleven year old son, Taylor, found the marijuana in the cooler as listed above. When he became upset over this, Dennis Frazier instructed Barbara Clark to tell Taylor what Wayne Naplin tells his children when they find marijuana, "Do you want a new bike? If you do, keep your mouth shut."

4 . Summary of additional information (if applicable.)

(signature handwritten)
ALVIN F. BAUMAN
NCW NARCOTICS TASK FORCE

Approved:

JOE SOLSENG
Deputy Prosecuting Attorney

Sworn and subscribed on:

Date: January 11, 1992 (handwritten)

Time: 1755 hours (handwritten)

David Edwards (handwritten)
JUDGE/COURT COMMISSIONER

APPENDIX G

DISTRICT COURT, STATE OF WASHINGTON

IN AND FOR THE COUNTY OF OKANOGAN

* * * * * * * * * * * * * * * * * * *

STATE OF WASHINGTON) NO. _____
: ss
County of Okanogan) SEARCH WARRANT

TO ANY PEACE OFFICER IN THE STATE OF WASHINGTON:

Upon the sworn affidavit of ALVIN F. BAUMAN, made before me, it appears that there is probable cause to believe that:

1. Evidence of a crime;

Possession with Intent to Deliver Marijuana and Conspiracy to Manufacture Marijuana and Involving Minors in Manufacture of Marijuana.

2. Contraband, the fruits of a crime, or things otherwise criminally possessed, or;

A. BOOKS, RECORDS, RECEIPTS, NOTES, LEDGERS AND OTHER PAPERS RELATING TO POSSESSING AND TRAFFICKING IN MARIJUANA.

B. ADDRESS AND/OR TELEPHONE BOOKS AND PAPERS LISTING NAMES, ADDRESSES AND/OR TELEPHONE NUMBER OF ANY PERSONS WHO MAY BE INVOLVED IN ILLEGAL POSSESSING AND TRAFFICKING OF MARIJUANA.

C. BOOKS, RECORDS, RECEIPTS, BANK

STATEMENTS AND RECORDS, MONEY DRAFTS, LETTERS OF CREDIT, MONEY ORDER AND CASHIER CHECKS RECEIPTS, PASSBOOKS, BANK CHECKS AND ASSETS AND THE OBTAINING, SECRETING, TRANSFER, CONCEALMENT AND/OR EXPENDITURE OF MONEY, SAFE DEPOSIT BOX RECORDS AND/OR KEYS.

D. UNITED STATES CURRENCY, PRECIOUS METALS, JEWELRY AND FINANCIAL INSTRUMENTS, INCLUDING, BUT NOT LIMITED TO STOCKS AND BONDS, REAL ESTATE DEEDS OF TRUST AND REAL ESTATE DEEDS.

E. PHOTOGRAPHS, IN PARTICULAR, PHOTOGRAPHS OF CO-CONSPIRATORS AND ASSETS AND/OR OF MARIJUANA.

F. INDICIA OF OCCUPANCY, RESIDENCY, AND/OR OWNERSHIP OF THE PREMISES DESCRIBED HEREIN, INCLUDING, BUT NOT LIMITED TO, UTILITY AND TELEPHONE BILLS,CANCELED ENVELOPES AND KEYS.

G. LUXURY ITEMS INCLUDING, BUT NOT LIMITED TO, ELECTRONIC EQUIPMENT SUCH AS, STEREOS, T.V.'S, VCR'S AND MOTOR VEHICLES.

H. ANY AND ALL OTHER MATERIAL EVIDENCE OF VIOLATIONS OF RCW 69.50.401, TO INCLUDE BUT NOT LIMITED TO DRUG PARAPHERNALIA FOR PACKAGING, WEIGHING, DISTRIBUTING, AND USING MARIJUANA AND OTHER NARCOTICS SUCH AS SCALES, BAGGIES, GRINDERS, SNIFFER,S HYPODERMIC NEEDLES AND SYRINGES AND SMOKING DEVISES.

I. Growing marijuana, drying marijuana and marijuana in any other form; growing equipment, including drying racks, hoses, pipes, fertilizer, potting soil and the like. Also, papers including books, records and ledgers indicating transactions, records of the growing

operation, finances and identification of ownership or possession.

3. Weapons or other things by means of which a crime has been, committed or reasonably appears about to be committed are under the control or in the possession of some person(s) and are concealed in or on certain premises, vehicles or persons within Okanogan County, Washington hereinafter described.

YOU ARE COMMANDED TO:

1. Search said premises, vehicle or person specifically described as follows:

The residence at Star Route, Box 63, Oroville, Washington. The residence is a trailer house with a metal barn next to it, including all the curtilage of said premises and all outbuildings, sheds, garages and any other buildings on the curtilage of the premises, attached or unattached. The residence is located on Mary Ann Creek Road approximately two miles east of the Molson Summit/Mary Ann Creek Road junction. Affiant is familiar with Wayne Naplin, his vehicles, and his residence and will direct the service of the search warrant.

Wayne Roger Naplin, Born 11-28-48

2. Search the following property:

(X) Evidence of a crime (describe):

Possession with Intent to Deliver Marijuana and Conspiracy to manufacture Marijuana and INvolving Minors in Manufacture of Marijuana.

(X) Contraband, the fruits of a crime, or things otherwise criminally possessed consisting of:

A. BOOKS, RECORDS, RECEIPTS, NOTES, LEDGERS AND OTHER PAPERS RELATING TO POSSESSING AND TRAFFICKING IN MARIJUANA.

B. ADDRESS AND/OR TELEPHONE BOOKS AND PAPERS LISTING NAMES, ADDRESSES AND/OR TELEPHONE NUMBERS OF ANY PERSONS WHO MAY BE INVOLVED IN ILLEGAL POSSESSING AND TRAFFICKING OF MARIJUANA.

C. BOOKS, RECORDS, RECEIPTS, BANK STATEMENTS AND RECORDS, MONEY DRAFTS, LETTERS OF CREDIT, MONEY ORDER AND CASHIER CHECKS RECEIPTS, PASSBOOKS, BANK CHECKS AND ASSETS AND THE OBTAINING, SECRETING, TRANSFER, CONCEALMENT AND/OR EXPENDITURE OF MONEY, SAFE DEPOSIT BOX RECORDS AND/OR KEYS.

D. UNITED STATES CURRENCY, PRECIOUS METALS, JEWELRY AND FINANCIAL INSTRUMENTS, INCLUDING, BUT NOT LIMITED TO STOCKS AND BONDS, REAL ESTATE DEEDS OF TRUST AND REAL ESTATE DEEDS.

E. PHOTOGRAPHS, IN PARTICULAR, PHOTOGRAPHS OF CO-CONSPIRATORS AND ASSETS AND/OR OF MARIJUANA.

F. INDICIA OF OCCUPANCY, RESIDENCY, AND/OR OWNERSHIP OF THE PREMISES DESCRIBED HEREIN, INCLUDING, BUT NOT LIMITED TO, UTILITY AND TELEPHONE BILLS, CANCELED ENVELOPES AND KEYS.

G. LUXURY ITEMS INCLUDING, BUT NOT LIMITED TO, ELECTRONIC EQUIPMENT SUCH AS, STEREOS, T.V.S, VCR'S AND MOTOR VEHICLES.

H. ANY AND ALL OTHER MATERIAL EVIDENCE OF VIOLATIONS OF RCW 69.50.401, TO INCLUDE BUT NOT LIMITED TO DRUG PARAPHERNALIA FOR PACKAGING, WEIGHING, DISTRIBUTING, AND USING MARIJUANA AND OTHER NARCOTICS SUCH AS SCALES, BAGGIES, GRINDERS, SNIFFER,S HYPODERMIC NEEDLES AND SYRINGES AND SMOKING DEVISES.

I. Growing marijuana, drying marijuana and marijuana in any other form; growing equipment, including drying racks, hoses, pipes, fertilizer, potting soil and the like. Also, papers including books, records and ledgers indicating transactions, records of the growing operation, finances and identification of ownership or possession.

3. Safely keep property seized;

4. Return this warrant to the undersigned judge within three (3) judicial days following issuance. The return must include an inventory of all property seized.

A COPY OF THIS WARRANT AND A RECEIPT FOR THE PROPERTY TAKEN SHALL BE GIVEN TO THE PERSON(S) FROM WHOM OR FROM WHOSE PREMISES PROPERTY IS TAKEN. IF NO PERSON IS FOUND IN POSSESSION, A COPY AND RECEIPT SHALL BE CONSPICUOUSLY POSTED AT THE PLACE WHERE THE PROPERTY IS FOUND.

DATED this 11th day of January ,1992.

handwritten signature
JUDGE David Edward

As authorized by the above judge pursuant to CrR 2.3 (telephonic search warrant).

handwritten signature

NAME Alvin F. Bauman

TYPED NAME

Senior Border Patrol Agent

TITLE